MEGAN Q. LIU
550 Vanderbilt Avenue, Apt. 810, Brooklyn, NY 11238
(917) 478-0944
mql2102@columbia.edu

March 6, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a third-year student at Columbia Law School – and am writing to apply for a clerkship in your chambers for the 2023–24 term or any term thereafter. After graduation, I plan to join Sullivan & Cromwell in New York as a litigation associate.

Having lived and worked across three continents, I am privileged to have homes in cultures that teach me to see the world through a diverse lens. At all stages of my personal, professional, and academic career, I benefited from understanding viewpoints different from my own, and in turn, refining and testing my initial thoughts. I seek to approach my clerkship – and my legal career – with an open mind.

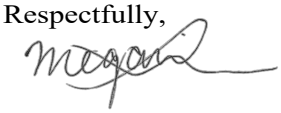
My parents immigrated from China to America, where they met in New York. They both firmly believe that America is the greatest country in the world – and wish to provide only the best opportunities for me. The values they instilled led me to public service at UNICEF in Beijing and New York, and at law school. My parents are not lawyers, nor did they wish for me to become a lawyer. But they were the first to remind me that this law degree, our legal profession, is a privilege. It is a career in which we have the tools to try to do the right thing, every day. For this reason, I hope to serve as your law clerk and work to ensure that decisions rendered are "right."

Please find enclosed my resume, law school transcript, undergraduate transcript, writing sample, and letters of recommendation from:

- Professor Elizabeth Emens (212 854-8879, eemens@law.columbia.edu);
- Professor Christina Ponsa-Kraus (212 854-6579, cponsa@law.columbia.edu); and
- Professor Daniel Richman (212 854-9370, drichm@law.columbia.edu).

If there is any other information that would be helpful, please do not hesitate to contact me. Thank you for your consideration.

Respectfully,



Megan Q. Liu

MEGAN Q. LIU
550 Vanderbilt Avenue, Apt. 810, Brooklyn, NY 11238 · (917) 478-0944 · mql2102@columbia.edu

EDUCATION

Columbia Law School, New York, NY
Juris Doctor, expected May 2022
Honors: James Kent Scholar (2020–21); Harlan Fiske Stone Scholar (2019–20)
Dean's Honors, Constitutional Law (for top 3–5% of the class)
Human Rights Institute 1L Advocates Fellow
Activities: *Columbia Journal of Transnational Law*, Public Affairs Editor
Teaching Assistant to Professor Daniel J. Capra, Evidence
Teaching and Research Assistant to Professor Christina D. Ponsa-Kraus, Constitutional Law
Teaching and Research Assistant to Professor Elizabeth F. Emens, Contracts
Columbia Society of International Law, Professional Development Chair

Durham University, Durham, United Kingdom
Bachelor of Arts in English Literature, Business, and History, received June 2016
Honors: First Class Honors Degree

EXPERIENCE

Sullivan & Cromwell LLP, New York, NY
Summer Associate May 2021 – July 2021
Drafted sections of motion for compassionate release in a Criminal Justice Act case, wrote memoranda on the burden of proof in certifying a securities class action, and assisted with depositions and witness preparation.

Hon. Katherine Polk Failla, U.S.D.C., Southern District of New York, New York, NY
Judicial Intern and Extern May 2020 – September 2020; January 2021 – May 2021
Researched and drafted opinions addressing habeas corpus claims predicated on the COVID-19 pandemic, the imposition of sanctions for fabrication of documents, and procedural due process. Prepared bench memoranda on the Act of State doctrine and the appointment of interim class counsel in class action lawsuit.

United Nations Residual Mechanism for Criminal Tribunals, The Hague, Netherlands
Legal Affairs Intern, *Registry* January 2019 – May 2019
Proposed amendments to the Rules of Procedure and Evidence concerning the early release of war criminals.

UNICEF
Program Intern, New York, NY June 2018 – December 2018
Helped prepare for launch of "Generation Unlimited" program at the 73rd Session of the General Assembly. Co-chaired biweekly meetings with five Partnership teams.

Rapporteur, *Social Policy and Reform*, Beijing, China October 2017 – May 2018
Facilitated and moderated three roundtable discussions on child poverty with over 40 academics, private sector executives, and members of the Politburo Standing Committee. Evaluated research and wrote 16 reports circulated to over 2,000 stakeholders recommending policy interventions.

Guizhou Education Fund, Shanghai, China
Founder and Managing Director February 2017 – April 2019
Led community education center for 125 elementary and middle school students in a rural village. Planned language classes and parenting programs, managed leadership team and 70 volunteers, and raised 13,500 RMB.

PUBLICATIONS

Note, *The Scope of Sovereign Criminal Immunity: Instrumentalities Under the Foreign Sovereign Immunities Act*, 60 COLUM. J. TRANSNAT'L L. 276 (2021).

Can the Past Serve the Present? The Nanjing Massacre Memorial Hall, 3 J. CHINESE HUMANITIES 203 (2017).

ADDITIONAL INFORMATION

Languages: Mandarin Chinese (proficient)
Interests: Dramaturgy, musical theater, and snorkeling

Columbia
Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

02/07/2022 21:45:20

Program: Juris Doctor

Megan Qianyou Liu

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	
L6640-2	Journal of Transnational Law Editorial Board		1.0	
L9137-1	S. Sentencing	Richman, Daniel; Sullivan, Richard	2.0	
L6822-1	Teaching Fellows	Ponsa-Kraus, Christina D.	3.0	

Total Registered Points: 13.0

Total Earned Points: 0.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-1	Antitrust and Trade Regulation	McCrary, Justin	3.0	A
L7990-1	Introduction to Intellectual Property Law	Balganesh, Shyamkrishna	4.0	A-
L6640-2	Journal of Transnational Law Editorial Board		1.0	CR
L6274-2	Professional Responsibility	Gupta, Anjum	2.0	A
L6683-1	Supervised Research Paper	Richman, Daniel	1.0	CR
L6822-1	Teaching Fellows	Capra, Daniel	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6241-2	Evidence	Capra, Daniel	4.0	A
L6661-1	Ex. Federal Court Clerk - SDNY	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6640-1	Journal of Transnational Law		0.0	CR
L6683-1	Supervised Research Paper	Richman, Daniel	1.0	A
L6683-2	Supervised Research Paper	Ponsa-Kraus, Christina D.	1.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Pistor, Katharina	4.0	B
L6640-1	Journal of Transnational Law		0.0	CR
L6169-2	Legislation and Regulation	Kessler, Jeremy	4.0	A-
L6675-1	Major Writing Credit	Richman, Daniel	0.0	CR
L8499-1	S. Comparative and International Law Workshop [Minor Writing Credit - Earned]	Bradford, Anu	1.0	A-
L6685-1	Serv-Unpaid Faculty Research Assistant	Emens, Elizabeth F.	2.0	A
L6683-1	Supervised Research Paper	Richman, Daniel	2.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-3	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	CR
L6108-3	Criminal Law	Liebman, James S.	3.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-15	Legal Practice Workshop II	Statsinger, Steven	1.0	CR
L6118-1	Torts	Blasi, Vincent	4.0	CR
L6912-1	Transnational Litigation	Bermann, George A.	3.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-1	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	B+
L6105-7	Contracts	Emens, Elizabeth F.	4.0	A
L6113-2	Legal Methods	Sovern, Michael I.	1.0	CR
L6115-15	Legal Practice Workshop I	Statsinger, Steven; Yoon, Nam Jin	2.0	P
L6116-2	Property	Balganesh, Shyamkrishna	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 85.0

Total Earned JD Program Points: 72.0

Dean's Honors

A special category of recognition in Spring 2020 awarded to the most outstanding students in each course (top 3-5%).

Semester	Course ID	Course Name
Spring 2020	L6133-3	Constitutional Law

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	2L
2019-20	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0

Durham University
Student Registry

Shaped by the past, creating the future

19 August 2016

To Whom it May Concern

Name:	Megan Qianyou Liu
Date of Birth:	04 April 1996
University ID Number:	000242168

This is to certify that the above-named person was a registered student on the full-time programme of study named below:

PROGRAMME CODE:	QRV0
PROGRAMME DESCRIPTION:	Combined Honours in Arts
QUALIFICATION:	Bachelor of Arts
CLASSIFICATION:	Class I (Honours)
COLLEGE:	St Aidan's College
COMMENCEMENT DATE:	30 September 2013
LEAVING DATE:	24 June 2016
DATE OF AWARD:	28 June 2016
PRIZES AND DISTINCTIONS:	

Signature:

University Stamp: UNIVERSITY OF DURHAM

Customer Services Team
Mr I S Buckingham

Durham University Student Registry The Palatine Centre Stockton Road Durham
DH1 3LE

Telephone +44 (0)191 334 6435
www.durham.ac.uk/student.registry
Durham University is the trading name of the University of Durham

University of Durham
Academic Transcript

Name: Megan Qianyou Liu

Student Information:

Date of Birth: 4 April 1996
College: St Aidan's College
University ID Number: 000242168
HESA ID Number: 1311162421686
Date of Admission: 30 September 2013
Date of Leaving: 24 June 2016
Mode of Study: Full Time

Programme Information:

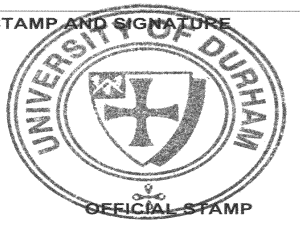
Award: Bachelor of Arts
Programme Title: Combined Honours in Arts
Programme Code: QRV0
Programme Outcome: Class I (Honours)
Date of Award: 28 June 2016
Min. Full-Time Duration: 3 year(s)

Module Code		Module Title	Module Level	Mark (%)	University Credits
Academic Year 2013-2014					
HIST	1481	Introduction to Chinese History	1	54	20
ENGL	1011	Introduction to Drama	1	71	20
SGIA	1041	Ideas and Ideologies	1	40	20
ECON	1021	Economic Methods	1	58	20
ECON	1011	Elements of Economics	1	71	20
SGIA	1091	Theory and History in International Relations	1	64	20
Academic Year 2014-2015					
ENGL	2021	Shakespeare Level 2	2	64	20
ENGL	2011	Theory and Practice of Literary Criticism	2	64	20
ENGL	2331	Keats and Shelley	2	61	20
HIST	2201	Modern China's Transformations	2	61	20
BUSI	2131	Managing in a Global Environment	2	72	20
BUSI	1151	New Venture Creation	1	70	20
Academic Year 2015-2016					
HIST	2611	Power and Primacy: Sino-Japanese Relations in the Long Twent ieth Century, 1894-2014	2	62	20
ENGL	3162	40-credit dissertation in English	3	74	40
ENGL	3071	Victorian Literature Level 3	3	74	20
ENGL	3081	Literature of the Modern Period	3	73	20
BUSI	3161	Leadership	3	72	20

Comments:

NOT AN OFFICIAL TRANSCRIPT WITHOUT THE UNIVERSITY STAMP AND SIGNATURE

Student Registry
The Palatine Centre
Durham University
Stockton Road
Durham DH1 3LE
Tel: +44 191 334 6436
E-Mail: student.registry@durham.ac.uk



For Registrar and Secretary

This transcript does not show the outcomes of decisions made by Boards of Examiners about any mitigating circumstances or medical evidence which may exist for the student named. The overall academic performance of the student, as judged by the Board of Examiners, is reflected in the degree classification awarded by the University.

March 06, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to write a letter in support of Megan Liu's application for a clerkship in your chambers. She is an excellent student and would make a fine law clerk.

Megan took my 1L Constitutional Law course in the Spring 2020 semester and served as my research assistant this past spring. Spring 2020 was, of course, the semester in which we switched to "remote" learning essentially overnight, and like many other law schools, Columbia switched to a credit/fail grading system. That said, we professors still "shadow" graded, and as you know from her application materials, Megan earned Dean's Honors in my course, putting her in the top 3-5% of the class. Megan's performance overall in her first year was, not surprisingly, very strong, earning her the designation of Harlan Fiske Stone Scholar, which the law school awards to students in the top third of the class. This year her performance was even more outstanding, earning her the James Kent Scholar designation, awarded to the students in the top academic tier.

As a research assistant for me this past spring, Megan did excellent work on a couple of small projects. Her research was diligent and thorough, and the memorandum she produced for one of them was clear, concise, and illuminating. As both her performance in my course and as a research assistant suggest, Megan is a particularly good writer with strong analytical skills.

Megan's background as the child of two Chinese immigrants has given her a vivid sense of how different her world is from that of her parents and of how important her legal education is to her own voice and empowerment. As she puts it, when she was a girl her mother described Megan as the "first feminist" she had ever known, and she did not mean it as a compliment. Megan has a keen sense of appreciation for her legal education and a desire to excel, fortunately matched by her intelligence and talent.

In addition to all of the above, Megan is a very personable young woman. Over the past two years, our students have faced the extraordinary challenge of trying to get to know their professors while we were all spread all over the place and interacting only virtually. Megan has been among a handful of the most successful students in this regard. She stepped up to the challenge by reaching out to me at the end of the semester to express her interest in working as a research assistant (though I would have contacted her if she had not contacted me), and she has consistently displayed a judicious sense of how to stay in regular contact and maintain our relationship virtually.

In short, Megan is an intelligent and capable student, who would contribute to chambers her excellent research and writing skills, her professionalism, and her likeable personality. I wholeheartedly support her application.

Regards,
Christina Duffy Ponsa- Kraus
George Welwood Murray Professor of Legal History

Christina Ponsa-Kraus - cdb2124@columbia.edu - 212 - 854 - 0722

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

March 06, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Megan Quinyou Liu

Dear Judge Liman:

I write to enthusiastically support the application of Megan Quinyou Liu, a Columbia Law School 3L (Class of 2022), to clerk for you. She is truly smart and effective, and would doubtless do extraordinary work in your chambers.

I got to know Megan quite well in her 2L year, when she worked with me on her Columbia Journal of Transnational Law note, The Scope of Sovereign Criminal Immunity: Instrumentalities Under the Foreign Sovereign Immunities Act. Intrigued by the emergence of the issue in recent SDNY litigation, Megan came to me set on her desire to dig into how the FSIA interacted with criminal liability while lacking much familiarity with the area. No matter, she dove in and mastered a truly complicated landscape – one in which some of the most relevant cases came from civil RICO actions! The terrific end result will be published next year.

The piece gave ample opportunity for Megan to display her enormous talents and intellectual scope, as well as organizational and writing skills. She writes beautifully and is a pleasure to work with. She responds extremely well to criticism, quickly grasps the points, and delivers accordingly. Yet there is no blind obedience, and we had lively conversations about issues of both organization and substance, as she wrestled all the moving doctrinal parts into place.

Megan's interest in transnational issues comes naturally. Born in the US to Chinese immigrants who soon returned to China, she went to a British international high school, but didn't learn about the Cultural Revolution and Tiananmen protests until she went to college at Durham University in the UK. After acing her way through college, Megan worked for UNICEF in both Beijing and New York. Her cross-cultural aptitude is truly impressive: She moved to the UK without any family, and reports that she and her parents don't "share fluency in a common language." She isn't completely fluent in Mandarin and her parents aren't fluent in English. Though she has not seen her parents (other than on FaceTime) in over a year, I've never seen her flag in her good humor and commitment to her work.

Bottom line, Megan is a lovely person with a truly sharp mind, extraordinary analytical abilities, and a readiness to work extremely hard. I think you'd like her a lot.

If there is anything further I can say that would be of use to you, please do not hesitate to call or e-mail.

Respectfully,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

March 07, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to recommend Ms. Megan Liu for a clerkship in your chambers. Ms. Liu is a thoughtful, thorough, hard-working, and conscientious law student whom I expect will be an outstanding clerk.

I know Ms. Liu in three principal ways: she was a student in my Contracts class, she was my Research Assistant, and then, most recently, she served as my Teaching Assistant for my Contracts course. I therefore have a good basis on which to comment on her performance and prospects.

Ms. Liu was a student in my Contracts class in the Fall of 2019. She earned an "A" grade, based on her terrific performance on a difficult, anonymously graded exam. The exam required students to write two essays: one analyzing traditional legal problems in order to predict how a court would decide them, and a second evaluating the conceptual underpinnings of contract law and applying them to specific doctrines. It also required students to apply their knowledge of doctrine to solve problems on a set of challenging multiple choice questions.

Ms. Liu's performance in Contracts demonstrated both her existing skill set and her determination to improve. On the ungraded midterm, Ms. Liu answered only two out of nine multiple choice questions correctly. After consulting with the Teaching Assistant and working hard to master this type of question and the material, Ms. Liu answered seventeen out of twenty-one multiple choice correctly on the final exam. Her essays were both terrific, and her black-letter law issue-spotter was particularly effective. She answered questions well in class and then came to office hours to deepen her thinking.

Based on her strong performance in Contracts, I invited Ms. Liu to become my Research Assistant (RA). My RAs submit written memos to me, and they also present their findings to each other and to me in periodic RA Briefing Meetings. Ms. Liu was excellent by all measures. She wrote effective and responsive substantive memos for me on widely varying topics, including disability, discrimination, leadership, and mindfulness. I also recall that she presented her findings skillfully in the oral briefings. She was eager for and responsive to feedback, though I remember giving her only one small piece of constructive feedback about a matter of formatting. Her work was terrific, and I asked her permission to use one of her memos as a sample for future RAs.

As a Teaching Assistant (TA), Ms. Liu stood out among an especially strong team of TAs supporting me and the students in an unusually large (140 person) Contracts class. I repeatedly heard from students how helpful Ms. Liu, in particular, was to them, and I recall she was also quick to give credit to other TAs for work well done—demonstrating her collegiality. Ms. Liu also showed a willingness to speak up and share information that was useful to my decision-making on challenging issues (such as whether to administer exams remotely). She also stepped up and took on important tasks and executed them effectively.

Ms. Liu not only excelled in the classroom, earning high honors, and as a Research and Teaching Assistant during law school; she has taken on substantive activities and leadership roles as well. For instance, she was selected as one of ten students by Columbia Law's Human Rights Institute as a Human Rights Advocates Fellow in her 1L year. She has served on the Editorial Board of the Columbia Journal of Transnational Law. And she planned a roundtable discussion on ratifying the Convention on the Elimination of All Forms of Discrimination Against Women, with a distinguished array of speakers from around the world.

In Summer 2020, Ms. Liu interned with Judge Failla in the Southern District of New York. Although the original internship was ten-weeks long, Judge Failla asked Ms. Liu to continue working for an additional four weeks during the summer. Ms. Liu was also invited to continue during the Spring 2021 semester on a part-time basis. She found that experience to be invaluable, not only to improving her already terrific legal research and writing skills but also to building her capacity to craft and defend an argument. In the Summer of 2021, Ms. Liu gained additional experience as a Litigation Associate at Sullivan and Cromwell.

Before coming to Columbia, Ms. Liu worked in the nonprofit sector for several years. As a rapporteur at UNICEF Beijing, Ms. Liu summarized China's priorities on multi-dimensional child poverty in reports that were later circulated to a global audience. And prior to that, Ms. Liu worked with a small team to build a community education center in a secluded, rural village in China. Ms. Liu brings a wealth of experience and a determination that complement her talents to position her well for the career she anticipates in litigation. I predict she will realize her aspiration to work in government as an Assistant US Attorney.

I expect that Ms. Liu will be an excellent addition to whatever chambers is fortunate enough to hire her. I recommend her to you most strongly.

Let me know if I can provide any further information. I would be happy to speak about her. I can be reached through my assistant, Kiana Taghavi (ktaghavi@law.columbia.edu), by email (above), or on my cell phone at 718-578-9469.

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

Sincerely,

Elizabeth F. Emens

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

WRITING SAMPLE

Megan Q. Liu

In my second year of law school, I served as an extern to the Honorable Katherine Polk Failla. In that capacity, I prepared this bench memorandum addressing a motion to dismiss constitutional challenges to Governor Andrew Cuomo's Executive Order No. 205, which was predicated on the COVID-19 pandemic. This memorandum is my own work product and has not been subject to any substantial editing by any other person. To preserve confidentiality, the Plaintiff's name and other identifying information have been redacted. I have received permission from Judge Failla to use this memorandum as a writing sample.

FROM: Megan Q. Liu
TO: Hon. Katherine Polk Failla
DATE: May 2021
RE: Defendants' Motion to Dismiss, *Plaintiff* v. *Cuomo, et al.*, No. XX Civ. XXX

SUMMARY

Plaintiff, an attorney proceeding *pro se*, filed the instant action against Governor Andrew Cuomo and New York Department of Health Commissioner Howard Zucker, M.D., in their official capacities (collectively, the "Defendants"). Plaintiff raises a number of constitutional challenges to the enforcement of New York State Executive Order No. 205 (hereinafter, the "Executive Order"), which imposed certain quarantine requirements in response to the COVID-19 pandemic, at the time of filing. Specifically, Plaintiff argues that the Executive Order violates: (i) his federal constitutional right to interstate travel; (ii) the Privileges and Immunities Clause of Article IV; and (iii) the Contracts Clause of Article I.

Defendants have moved to dismiss Plaintiff's Amended Complaint for failure to a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, Defendants' motion to dismiss the Amended Complaint should be granted.

BACKGROUND[1]

A. The Parties and Executive Order No. 205

On June 24, 2020, Governor Cuomo issued the New York State Executive Order No. 205, titled "Quarantine Restrictions on Travelers Arriving in New York." (*See* Executive Order). The Order is one in a series of evolving emergency actions taken by New York State

[1] This Memorandum draws on facts alleged in Plaintiff's Amended Complaint ("FAC" (Dkt. #X)), which is the operative pleading in this action. When considering a motion made pursuant to Rule 12(b)(6), the Court may take judicial notice of "documents retrieved from official government websites," *see Wells Fargo Bank, N.A.* v. *Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015), or other "relevant matters of public record." *See Giraldo* v. *Kessler*, 694 F.3d 161, 164 (2d Cir. 2012); *see also* Fed. R. Civ. P. 201(b) (permitting judicial notice of facts "not subject to reasonable dispute"). Accordingly, where relevant, the Court may acknowledge public health statistics and COVID-19 quarantine restrictions enacted after Plaintiff's filing of his Amended Complaint.

Defendants submitted additional background information in support of their motion, in the form of the Declaration of X and exhibits (Dkt. #XX). The Court may take judicial notice of certain exhibits appended to the declaration that are retrieved from official government websites. For this reason, additional facts come from the following exhibits: the January 23, 2020 World Health Organization Situation Report ("WHO Situation Report" (Dkt. #XX-2)); the July 9, 2020 World Health Organization Transmission of SARS-CoV-2 Brief ("WHO Brief" (Dkt. #XX-6)); the Executive Order No. 205 ("Executive Order" (Dkt. #XX-14)); the June 24, 2020 Interim Guidance for Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel ("Department of Health Interim Guidance" (Dkt. #XX-15)); and the July 13, 2020 New York State Department of Health Order for Summary Action ("Department of Health Order" (Dkt. #XX-16)). The transcript of the July 2, 2020 proceedings in *Corbett* v. *Cuomo*, No. 20 Civ. 4864 (LGS) (S.D.N.Y.), is referred to as "*Corbett* Tr." (Dkt. #19-1).

For ease of reference, the Memorandum refers to the parties' briefing as follows: Defendants' brief in support of their Motion to Dismiss as "Def. Br." (Dkt. #XX); Plaintiff's opposition brief as "Pl. Opp." (Dkt. #XX); and Defendants' reply brief as "Def. Reply" (Dkt. #XX).

in response to the ongoing COVID-19 pandemic, and directs Health Commissioner Zucker to issue a travel advisory stating that:

> All travelers entering New York from a state with a positive test rate higher than 10 per 100,000 residents, or higher than a 10% test positivity rate, over a seven-day rolling average, will be required to quarantine for a period of 14 days consistent with Department of Health regulations for quarantine.

(*Id.*).

Plaintiff is an attorney who resides in State A, a state which was subject to the Executive Order at the time he filed his Amended Complaint. (FAC ¶¶ 2, 58). Since April 2010, Plaintiff's practice includes the representation of wrongfully terminated and harassed employees in New York State. (*Id.* at ¶¶ 4-5). He wishes to travel to New York State in connection with his employment practice. (*See id.* at ¶¶ 58-60).

B. Subsequent Developments in New York Quarantine Requirements

The Executive Order has been modified by subsequent executive orders and travel guidelines since the filing of Plaintiff's Amended Complaint. *See, e.g.*, Executive Order No. 205.1 (Sept. 2020); Executive Order No. 205.2 (Oct. 2020); Executive Order No. 205.3 (Dec. 2020). Most recently for these purposes, on April 10, 2021, the New York State Department of Health issued its "Updated Interim Guidance for Travelers Arriving in New York State" (the "Updated Interim Guidance"). This guidance equally applies to all travelers, including New Yorkers and those visiting from out-of-state or another country. As relevant here, it provides that "asymptomatic travelers entering New York from another country, U.S. state, or territory are *no longer required* to test or quarantine as of April 10, 2021." New York State COVID-19 Travel Advisory, https://coronavirus.health.ny.gov/covid-19-travel-advisory (last visited May 2021) (emphasis in original).

C. The Instant Litigation

Plaintiff initiated this action with the filing of his Complaint in June 2020, the day following the issuance of the Executive Order. (Dkt. #X). Five days later, Plaintiff filed his Amended Complaint, which is the operative pleading in this action. (Dkt. #X). Plaintiff asserts violations of: (i) his federal constitutional right to interstate travel; (ii) the Privileges and Immunities Clause; and (iii) the Contracts Clause. Plaintiff also submits that the Executive Order is unconstitutionally vague. Finally, Plaintiff seeks money damages, and injunctive and declaratory relief.[2]

[2] The Court need not address Plaintiff's Contract Clause, void-for-vagueness, and money damages claims in its decision on the motion to dismiss. In Plaintiff's opposition brief, he expresses his intent to withdraw his Contracts Clause claim. (Pl. Opp. 14). Further, Plaintiff's opposition brief fails to respond to Defendants' arguments in favor of the dismissal of his void-for-vagueness and money damage claims, and the Court will likely consider these points conceded. *See AT&T Corp.* v. *Syniverse Techs., Inc.*, No. 12 Civ. 1812 (NRB), 2014 WL 4412392, at *7 (S.D.N.Y. Sept. 8, 2014) (finding that plaintiff's "silence concedes the point" where it failed to discuss opponent's argument in its opposition brief). Although Plaintiff is *pro se*, for reasons discussed *infra*, the Court need not grant him the special solicitude typically afforded *pro se* litigants. *See* Discussion Sec. A.

DISCUSSION

A. Applicable Law

Under Rule 12(b)(6), a defendant is permitted to move that the plaintiff's action be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), a court must "draw all reasonable inferences in Plaintiff's favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A plaintiff is entitled to relief if she alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007).

Plaintiff is a licensed attorney who is proceeding *pro se*. Although the pleadings of *pro se* parties are typically "held to less stringent standards than formal pleadings drafted by lawyers," *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007), the law is clear that "*pro se* attorneys ... 'cannot claim [this] special consideration,'" *Holtz* v. *Rockefeller & Co.*, 258 F.3d 62, 82 n.4 (2d Cir. 2001) (quoting *Harbulak* v. *County of Suffolk*, 654 F.2d 194, 198 (2d Cir. 1981)); *see also Tracy* v. *Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010) (collecting cases supporting the proposition that "a lawyer representing himself ordinarily receives no [special] solicitude").

B. Analysis

1. The Amended Complaint is Not Moot

Plaintiff's Amended Complaint challenges the enforcement of an executive order that is no longer in effect. At the time the motion to dismiss was filed, Defendants did not make any arguments in favor of dismissing on grounds of mootness. But they *did* proffer that the Court should consider the Amended Complaint in light of amendments to the Order in effect at the time. (*See* Def. Reply Mem. 1-2). And as noted above, since Defendants' motion was briefed, New York State has ceased to require quarantine periods for asymptomatic travelers, regardless of the state from whence they came. (*See* Updated Interim Guidance).

When a case becomes moot, a district court no longer has subject-matter jurisdiction, *see Fox* v. *Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 140 (2d Cir. 1994), and courts may consider whether they have subject-matter jurisdiction *sua sponte* at any point in the litigation, *see Da Silva* v. *Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000). For this reason, at the outset, the Court may wish to address the threshold issue of whether it continues to retain subject-matter jurisdiction.

Under the "case or controversy" requirement of Article III of the Constitution, "at all times, the dispute before the court must be real and live, not feigned, academic, or conjectural." *Russman* v. *Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 118 (2d Cir. 2001). A case is moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal quotation marks omitted).

There is, however, a well-recognized exception to the mootness doctrine. A defendant's "voluntary cessation of challenged conduct does not ordinarily render a case moot." *Knox* v. *Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). However, a voluntary change of conduct moots a case if a defendant demonstrates that "[i] there is no reasonable expectation that the alleged violation will recur and [ii] interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Mhany Mgmt., Inc.* v. *Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016). Against this background, the Court may consider whether the voluntary cessation exception applies, or whether Plaintiff's Amended Complaint has been rendered moot by superseding guidance.

Given the extraordinary circumstances of the last fourteen months, the Court is likely to find that the voluntary cessation exception to mootness applies. The United States has seen progress towards a transition to "normalcy," largely because of improved vaccine availability and general decline in COVID cases. However, due to the dynamic nature of the pandemic, and the ensuing public health response to it, it is difficult to predict with any reasonable assurance whether restrictions may be reintroduced.

For this reason, recent Supreme Court guidance indicates that rescinding COVID-19 restrictions is insufficient to moot a lawsuit challenging that restriction. In *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, plaintiffs moved for temporary injunctive relief against Executive Order No. 202.68. 141 S. Ct. 63, 68 (2020). The Supreme Court held that the case was not moot, even though the restriction at issue was rescinded. *See id.* ("It is clear that this matter is not moot. And injunctive relief is still called for because the applicants remain under a constant threat [that the restrictions may be reimposed] … without prior notice.").

A sister court in this District recently derived "two mootness principles" from the *Roman Catholic Diocese* decision:

> [i] a lawsuit brought against COVID restrictions is not simply moot because the restrictions at issue have been rescinded; and [ii] if the COVID restrictions (at issue) have been rescinded in the course of litigation, the relevant inquiry is whether the plaintiff remains under a "constant threat" of those restrictions being reintroduced in the future.

Hopkins Hawley LLC v. *Cuomo*, No. 20 Civ. 10932 (PAC), 2021 WL 1894277, at *4 (S.D.N.Y. May 11, 2021). In *Hopkins Hawley*, Judge Crotty concluded that despite the revocation of certain restrictions on both indoor and outdoor dining, plaintiffs remained "under the 'constant threat' of confronting the [restrictions] again," and thus the case was not moot. *Id.* (collecting cases declining to dismiss COVID restriction challenges as moot); *see also Amato* v. *Elicker*, No. 20 Civ. 464 (MPS), 2021 WL 1430918, at *4 (D. Conn. Apr. 15, 2021) (holding that the plaintiffs' challenges to COVID-19 restrictions are not moot because the Governor of Connecticut "cannot say with certainty that it will never be necessary to re-impose restrictions in the future"); *but see Herndon* v. *Little*, No. 20 Civ. 205 (DCN), 2021 WL 66657, at *5 (D. Idaho Jan. 7, 2021) (acknowledging the unpredictable nature of the pandemic, but finding that "under the circumstances and given the details of Idaho's Stay Healthy Orders, it appears reasonably likely that the [COVID-19] restrictions will not be reimposed at a future time").

The Court will likely agree with Judge Crotty that there is a reasonable expectation that the quarantine requirement will reoccur. While on March 7, 2021, the Governor signed New York Senate Bill 5357 ("the Act") which purports to terminate the Governor's emergency powers during the COVID pandemic, as Judge Crotty observed, the Act merely modifies the Governor's emergency powers. *See* Act of March 7, 2021, ch. 71, 2021 N.Y. Laws 5357. In particular, under the Act, the Governor may still extend or modify currently existing COVID restrictions so long as he: (i) gives five days notice to the state legislature and affected municipalities; and (ii) provides an opportunity for the political branches to offer feedback on his proposed directives. *Id.*

In light of the unpredictability of the ongoing pandemic, and the Governor's retention of the authority to extend or modify existing COVID restrictions, the Court is likely to find that this case is not moot. The Court will accordingly address the merits of Plaintiff's challenges to the Executive Order in place at the time that the Amended Complaint was filed.

2. Plaintiff's Claims Fail Under Both the *Jacobson* Standard of Review and Traditional Judicial Scrutiny

In evaluating Plaintiff's constitutional claims, the Court must first address the appropriate standard of review to apply. In Defendants' view, the Court should apply the deferential framework set forth in *Jacobson* v. *Massachusetts*, which case established the standard for review of legislation enacted in times of public health crises. 197 U.S. 11 (1905). Plaintiff contends that *Jacobson* does not apply here, because the case was "circumscribed" to the Massachusetts statute in the context of smallpox. (*See generally* Pl. Opp. 6-10). Plaintiff argues that the Court should instead apply strict scrutiny because the Executive Order burdens a fundamental right – the right to interstate travel. (*Id.* at 10-11). *See Winston* v. *City of Syracuse*, 887 F.3d 553, 560 (2d Cir. 2018) (applying strict scrutiny when the challenged restriction "either [i] burdens a fundamental right; or [ii] targets a suspect class"). While *Jacobson* has more recently been called into question by Supreme Court decisions addressing the constitutionality of COVID restrictions, the Court should find that even if *Jacobson* is no longer applicable, Plaintiff's Amended Complaint must be dismissed under the traditional tiers of scrutiny.

a. The *Jacobson* Standard of Review

In *Jacobson*, more than a century ago, the Supreme Court upheld the constitutionality of a Massachusetts health regulation, which required all adults to receive a smallpox vaccination. 197 U.S. at 12-13. The Supreme Court held that, in times of public health crises, a state emergency measure "enacted for the public health" would only be struck down if it had "no real or substantial relation to [the public health] or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. While some judges have indicated that *Jacobson* may be akin to rational basis review, *see Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 70 (Gorsuch, J., concurring), others have determined that it cannot be equated with any of the tiers of scrutiny now synonymous with constitutional review because the decision predated the establishment of those tiers, *see Agudath Israel of Am.* v. *Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020).

At the beginning of the COVID-19 pandemic, a number of courts both within and outside this Circuit applied the *Jacobson* framework in considering challenges to state and local executive orders. *See Our Wicked Lady LLC* v. *Cuomo*, No. 21 Civ. 0165 (DLC), 2021

WL 915033, at *3 (S.D.N.Y. Mar. 9, 2021) (collecting cases). The Eighth Circuit went so far as to note that a district court's "failure to apply the *Jacobson* framework produced a patently erroneous result." *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020). And in August, a court in the Northern District of New York considered and rejected a similar challenge to Executive Order No. 205, finding that it met the *Jacobson* standard. *See Page* v. *Cuomo*, 478 F. Supp. 3d 355, 366 (N.D.N.Y. 2020), *appeal filed*, No. 20-2704 (2d Cir. Aug. 13, 2020).

However, Plaintiff's position has since been bolstered by recent doctrinal developments from the Supreme Court, which place the deferential *Jacobson* framework in question. Over a century after *Jacobson*, the Supreme Court addressed the constitutionality of a New York executive order that restricted limits on in-person religious services, during a new public health emergency, the COVID-19 pandemic. *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 63. There, the Supreme Court temporarily enjoined the executive order, and in doing so, applied the traditional constitutional tiers of scrutiny, not the *Jacobson* framework. The Court determined that strict scrutiny applied, as the challenged restrictions were not "neutral" or of "general applicability." *Id.* at 67.

The Court's per curiam opinion did not mention *Jacobson*, though the parties addressed the *Jacobson* standard in their briefing. *See, e.g.*, Appellants' Br. in *Roman Catholic Diocese of Brooklyn*, No. 20A87, at 2-3, 30-34 (indicating one question presented on appeal is whether the courts below erred in concluding that *Jacobson* applies to all public health emergencies). Instead, Justice Gorsuch issued a concurring opinion, which made explicit his view that the "usual constitutional standards should apply during the current pandemic," rather than the *Jacobson* standard. 141 S. Ct. at 69-70 (Gorsuch, J., concurring). While Justice Gorsuch did not go as far as to suggest that *Jacobson* has *no* precedential value, he indicated that *Jacobson* does not "tower[ ]" over all pandemic-related constitutional claims. *Id.* at 71; *see also id.* at 70 ("*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.").[3]

On remand, the Second Circuit indicated that *Jacobson* was no longer the correct legal framework for examining First Amendment Free Exercise Clause challenges against COVID-19 restrictions. *Agudath Israel of Am.*, 983 F.3d at 635 ("The district courts, the motions panel of this Court, and the Governor relied on *Jacobson* v. *Massachusetts*, as support for the notion that courts should defer to the executive in the face of the COVID-19 pandemic. But this reliance on *Jacobson* was misplaced.").

Since these decisions, some judges have waned in their confidence in the *Jacobson* framework. *See, e.g.*, *Amato*, 2021 WL 1430918, at *7 n.11 (applying traditional tiers of scrutiny to COVID-19 restrictions); *Big Tyme Investments, L.L.C.* v. *Edwards*, 985 F.3d 456, 470-71 (5th Cir. 2021) (Willet, J., concurring) (arguing *Jacobson* has been displaced after *Roman Catholic Diocese*). One court in this Circuit chose not to apply *Jacobson* to a challenge of the same executive order at issue as in *Roman Catholic Diocese*, even though the

[3] Four months before *Roman Catholic Diocese of Brooklyn*, Justice Alito also indicated that he is of the view that *Jacobson* should *not* provide the "last word on what the Constitution allows public officials to do during the COVID-19 pandemic." *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2608 (2020) (mem.) (Alito, J., dissenting). "It is a considerable stretch to read [*Jacobson*] as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case." *Id.*

plaintiffs did not allege First Amendment violations. *Plaza Motors of Brooklyn* v. *Cuomo*, No. 20 Civ. 4851 (WFK) (SJB), 2021 WL 222121, at *4-5 (E.D.N.Y. Jan. 22, 2021).

With respect to this Circuit, district courts largely have cabined the *Roman Catholic Diocese* decision to First Amendment free exercise challenges and have continued to apply *Jacobson* to other challenges to COVID-19 restrictions. *See Hopkins Hawley LLC* v. *Cuomo*, No. 20 Civ. 10932 (PAC), 2021 WL 465437, at *5 (S.D.N.Y. Feb. 9, 2021) ("Although *Roman Catholic Diocese* and *Agudath Israel* raise doubts as to *Jacobson*'s continuing viability, *Jacobson* bears directly on this case and has not been explicitly overruled, which means that this Court is bound by it."); *Our Wicked Lady*, 2021 WL 915033, at *3 (applying *Jacobson* in denying plaintiffs' request to preliminarily enjoin state and local COVID-19 restrictions).

All courts that have continued to apply *Jacobson* have reasoned that the scope of the *Roman Catholic Diocese* holding is somewhat unclear, given that the Supreme Court's per curiam decision neither commented directly on *Jacobson*'s continued viability nor cited to it at all. It is well-recognized that if a Supreme Court decision "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *See Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). This Court will likely follow this reasoning on this motion, as other courts in this Circuit have. But in light of the uncertainty created by *Roman Catholic Diocese*, the Court should apply as, as an alternative basis, the traditional tiers of scrutiny. Plaintiff's constitutional claims are unlikely to succeed under either the deferential standard set forth in *Jacobson*, or alternatively, under a traditional constitutional analysis.

b. Plaintiff's Claims Should Be Dismissed Under *Jacobson*

Measured against the deferential *Jacobson* standard, Plaintiff has little chance of success. As noted above, *Jacobson* requires the State to prove a real and substantial basis for imposing a fourteen-day quarantine requirement. 197 U.S. at 31. The Executive Order clearly meets this standard, as it seeks to prevent additional introductions of the virus in New York and reduce an undue strain on New York's health care system.

First, COVID-19 is "a highly infectious and potentially deadly respiratory disease … that spreads easily from person-to-person." *See* WHO Situation Report 6. As of June 27, 2020, three days after the Order was announced, the virus had already killed over 24,500 people in New York State. Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic, https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-0 (last visited May 2021).

Second, New York set quarantine restrictions in place to combat the spread of the virus.[4] In determining the parameters for such restrictions, Defendants issued the Order in reliance on governmental public health agencies. *See* Executive Order ("The Governor has

[4] The Supreme Court has previously recognized that "quarantine laws," a special category, have been "repeatedly upheld even though they appear to single out interstate [activity] for special treatment." *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 628 (1978) (collecting cases). Where, as here, the very act of "movement [can] risk[ ] contagion and other evils," courts have found that quarantine restrictions reduce the exposure of residents to harmful diseases. *Id.* at 628-29.

undertaken a cautious, incremental and evidence-based approach to reopening the State of New York."). The World Health Organization found that the incubation period of COVID-19, that is, the time between exposure to the virus and symptom onset, is "on average 5-6 days, but can be as long as 14 days." *See* WHO Brief. As the upper limit of the incubation period, fourteen days was reasonably selected as the quarantine period for travelers. If a person did not exhibit any symptoms within fourteen days of entering the state, then it is less likely that she was infected with the virus at the time of entry.

Third, New York State had special reason to implement this strategy because, between January and March 2020, over 2.2 million travelers entered the State. *See* Department of Health Interim Guidance. At the time Executive Order No. 205 was announced, New York was "one of only a few states reported to be on track to contain COVID-19" when other parts of the country had "increased prevalence of COVID-19." *See* Executive Order. There was a reasonable concern that the influx of out-of-state travelers would spread the virus to New York residents.

Other courts in this Circuit have upheld the Executive Order and its successors under *Jacobson* on similar grounds. *See, e.g., Page*, 478 F. Supp. 3d at 367 (finding that Executive Order No. 205 bears a real or substantial relation to public health); *Weisshaus* v. *Cuomo*, No. 20 Civ. 5826 (BMC), 2021 WL 103481, at *11 (E.D.N.Y. Jan. 11, 2021) (same regarding Executive Order No. 205.1).

The Court is accordingly likely to find that the Executive Order survives under the *Jacobson* standard. In the alternative, even if the Court applied the traditional tiers of scrutiny, Plaintiff's claims also fail.

c. Plaintiff's Claims Should Be Dismissed Under Traditional Tiers of Scrutiny

1. Fundamental Right to Travel is Not Implicated

Plaintiff claims that the Executive Order violates his fundamental right to travel among the states. (FAC ¶¶ 63-68). As the Supreme Court has explained, the "right to travel" is not explicitly mentioned in the text of the Constitution, *see Saenz* v. *Roe*, 526 U.S. 489, 498 (1999), but it is "firmly established" as fundamental, *see Attorney General of N.Y.* v. *Soto-Lopez*, 476 U.S. 898, 902-03 (1986) (plurality opinion). Plaintiff correctly argues that if a challenged state action burdens a fundamental right or liberty interest, it is ordinarily subject to strict scrutiny. (Pl. Opp. 10-11). *See Winston*, 887 F.3d at 560. To survive strict scrutiny, the government must show that the regulation is "narrowly tailored to promote a compelling governmental interest," and "must use the least restrictive means to achieve its ends." *Evergreen Ass'n, Inc.* v. *City of N.Y.*, 740 F.3d 233, 246 (2d Cir. 2014). If a fundamental right is not burdened, the Executive Order need only survive rational basis review, which requires a "rational[ ] relat[ionship]" between the quarantine requirement and "a legitimate state interest." *City of Cleburne, Tex.* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

As Plaintiff lives in a "restricted" state, were he to have then entered New York at the time the Executive Order was in effect, he would have been required to quarantine for fourteen days. (FAC ¶ 58). When the Amended Complaint was filed, at least two hotels would not accommodate guests who must self-isolate. (Pl. Opp. 12). Even if a hotel would

welcome out-of-state travelers who quarantine, "the hotel bill would be approximately $2,100," which, Plaintiff argues, would impose a financial burden upon travelers from restricted states. (*Id.*). In response, Defendants argue that Plaintiff has not "plausibly alleged" that the Executive Order burdens his right to travel, and that the Order thus need only survive rational basis review. (Def. Mem. 9 (citing *Fitzgerald* v. *Racing Association of Central Iowa*, 539 U.S. 103, 107 (2003)).

The Supreme Court has held that the constitutional right to travel embraces at least three different components:

> [i] the right of a citizen of one State to enter and to leave another State, [iii] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [iii] for those travelers who elect to be permanent residents, the right to be treated like other citizens of that State.

Saenz, 526 U.S. at 500. A law only implicates this right "when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Town of Southold* v. *Town of E. Hampton*, 477 F.3d 38, 53 (2d Cir. 2007) (citing *Attorney Gen. of N.Y.* v. *Soto-Lopez*, 476 U.S. 898, 903 (1986)). The response to COVID-19 demonstrates that the purpose of the Order was not to impede travel, but to prevent the spread of the pandemic. *See* Executive Order (explaining its purpose "in light of the significant risk posed to the health and welfare of all residents by the further spread of COVID 19" is to "protect the progress made" by New York State). Here, the dispute at issue is whether the Executive Order deters travel.

Several courts in this Circuit have considered whether the Executive Order deters travel, but have reached differing conclusions.[5] On the one hand, in *Corbett* v. *Cuomo*, Judge Schofield held that the fourteen-day quarantine requirement implicates the right to travel. (*Corbett* Tr. 25:19-21). The order "*deters* individuals from entering the state," which in turn "affects some of the components of the right to travel as set forth in *Saenz*." (*Id.* at 25:18-24 (emphasis added)).

On the other hand, in *Page*, a court in the Northern District of New York reached a different conclusion, though it recognized that *Corbett* held otherwise. *See* 478 F. Supp. at 370. The district court began with the assertion that "not everything that deters travel burdens the fundamental right to travel," *id.* (citing *Matsuo* v. *United States*, 586 F.3d 1180, 1183 (9th Cir. 2009)), and concluded that it was "far from clear" that the Executive Order burdens any component of the right to travel. *Id.* In reaching this conclusion, the court also observed that:

> Under the plain terms of the Order, individuals from restricted states remain free to enter New York. They must comply with the quarantine requirement after they arrive, but that requirement is equally applicable to a New York resident who has arrived from a

[5] Courts in other circuits have been similarly split. *See, e.g., Bayley's Campground Inc.* v. *Mills*, No. 20-1559 (DJB), 2021 WL 164973 at *159 (1st Cir. Jan. 19, 2021) (indicating that right to travel *is* burdened by a Maine executive order imposing fourteen-day travel quarantine); *but see also Carmichael* v. *Ige*, 470 F. Supp. 3d 1133, 1145-47 (D. Haw. 2020) (holding that right to travel was *not* implicated by a Hawaii executive order imposing fourteen-day travel quarantine).

> restricted state. And whether resident or non-resident, any traveler who completes the quarantine remains completely free to travel freely within the State itself. In other words, the State is not drawing a distinction between residents and non-residents but between individuals with and without a mathematically heightened risk of spreading COVID–19.

Id.

The Court will likely agree with this analysis. As the Second Circuit has recognized, "travelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right." *Town of Southold*, 477 F.3d at 54; *see also Edwards* v. *California*, 314 U.S. 160, 184 (1941) (Jackson, J., concurring) (explaining that "[t]he right of the citizen to migrate from state to state … is not … an unlimited one," and that a citizen may not "endanger others by carrying contagion about"). Plaintiff does not dispute that he remains free to travel from a restricted state to New York, or that he may first travel to an unrestricted state and then to New York without the fourteen-day quarantine requirement. The fact that the Order may make travel less direct or convenient for some travelers does not meet the threshold required for strict scrutiny review. The Court should therefore apply rational basis review.

Under rational basis review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Tex.*, 473 U.S. at 440. The Court will likely conclude that the Executive Order rationally advances public health ends by mitigating the overall spread of the virus and reducing strain on New York's healthcare system.

Even assuming the Executive Order's quarantine requirement imposed a burden on Plaintiff's right to travel, and thereby triggered strict scrutiny, Plaintiff's claims nevertheless fail. (*See Corbett* Tr. 25:18-26:15 (holding that the Executive Order implicated the right to travel but survived strict scrutiny review)). *First*, there is no doubt New York has a compelling interest in combating the spread of the COVID-19 virus and avoiding additional strain on the health care system. *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67 ("Stemming the spread of COVID-19 is unquestionably a compelling interest."). Plaintiff does not argue otherwise, nor could he do so successfully.

Second, the Government can demonstrate that there was no less restrictive but equally effective means of achieving the Executive Order's public health goal. As explained above, the COVID-19 virus was highly contagious; it had an incubation period of up to fourteen days; and New York could anticipate high numbers of visitors, while its critical care capacity was limited. The Executive Order did not restrict individuals traveling from *all* states. It was tailored only to individuals traveling from states where there is a high community spread of the virus and a greater likelihood of infection. *See* Executive Order (applying only to "[all] travelers entering New York from a state with a positive test rate higher than 10 per 100,000 residents, or higher than a 10% test positivity rate, over a seven-day rolling average").

Accordingly, Defendants have met their burden of showing that the Executive Order was a calibrated response to the public health crisis, and at the time, there were no less restrictive alternatives. Thus, even assuming the quarantine is subject to strict scrutiny

instead of the deferential *Jacobson* standard, it is narrowly tailored to promote a compelling governmental interest.

2. Privileges and Immunities Clause Claim Fails

Plaintiff also asserts a claim under the Privileges and Immunities Clause of Article IV of the Constitution. (FAC ¶¶ 71-72). This claim is best understood as a variation of his right to travel claim, and the Court should address them together as such. The Privileges and Immunities Clause states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. One such privilege is the right to interstate travel. *Soto-Lopez* v. *New York City Civ. Serv. Comm'n*, 755 F.2d 266, 279 (2d Cir. 1985). The intent of the Clause is to "prevent[ ] a State from discriminating against citizens of other States in favor of its own." *Baldwin* v. *Fish & Game Comm'n of Montana*, 436 U.S. 371, 382 (1978) (citation omitted).

Here, the Order does not discriminate against non-New York residents in favor of New York residents. A New York citizen entering New York from a restricted state will be subject to the same requirements under the Executive Order. *See also Page*, 478 F. Supp. 3d at 370 (finding the Order's quarantine "requirement is equally applicable to a New York resident who has arrived from a restricted state"). Plaintiff concedes that the Order "does not – on its face – discriminate against … non-New York residents." (Pl. Opp. 13). He nevertheless contends that the Order, as applied, requires him to incur the costs of hotel living, while residents may quarantine in their own homes. (*Id.* at 13-14). Defendants argue, and the Court will likely agree, that the Plaintiff fails to plead a plausible claim. (Def. Br. 11).

Plaintiff has not adduced any evidence that hotel costs are more burdensome than the expense to maintain a home in New York. *See Schoenefeld* v. *Schneiderman*, 821 F.3d 273, 284-85 (2d Cir. 2016) (rejecting a Privileges and Immunities challenge to a law that permits New York attorneys to use their home as requisite place of business within state, whereas non-resident attorneys must lease an office). The Privileges and Immunities Clause "does not promise non-residents that it will be as easy for them as for residents to comply with a state's law." *Id.* at 285 (internal citations omitted). Rather, "[i]t promises only that state laws will not differentiate for the protectionist purpose of favoring residents at the expense of nonresidents," *id.*, and the Court will likely find that the Order did not manifest such protectionist intent here.

Nor does the Order implicate Plaintiff's fundamental right to travel, for the reasons stated above. *See Savage* v. *Mills*, 478 F. Supp. 3d 16, 28 (D. Me. 2020) (dismissing Privileges and Immunities claim because plaintiffs did not plead a right to travel). The Order is thus constitutional if the State can demonstrate a rational basis for enacting it. As a measure to limit COVID-19, the Order easily withstands this deferential review. Even if the Court assumes that the Privileges and Immunities Clause is implicated, and thus that strict scrutiny is merited, the Order can withstand the heightened review. The Order was the least restrictive means to achieve a compelling governmental interest, that is, to prevent the spread of COVID-19.

CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss is likely GRANTED.

Applicant Details

First Name	**Aden**
Middle Initial	**J**
Last Name	**MacMillan**
Citizenship Status	**U. S. Citizen**
Email Address	**ajm375@georgetown.edu**
Address	**Address** Street **1734 T St. NW** City **Washington** State/Territory **District of Columbia** Zip **20009** Country **United States**
Contact Phone Number	**9132054277**

Applicant Education

BA/BS From	**University of Southern California**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 23, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**American Criminal Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Reich, Jarrod
jarrod.reich@law.georgetown.edu
202-662-9875
Clark, Dan
dclark@risingforjustice.org
703-785-1389
Gornstein, Irv
ilg@law.georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ADEN JAYNE MACMILLAN
1734 T St. NW, Washington, DC 20009 • (913) 205-4277 • ajm375@georgetown.edu

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

March 6, 2022

Dear Judge Liman:

I am a 2021 *magna cum laude* graduate of Georgetown Law and a first-year litigation associate at Kirkland & Ellis LLP. I am applying to clerk in your chambers for the 2024 term. At Georgetown, I was elected to the Order of the Coif, served on the Senior Board of the *American Criminal Law Review* as Senior Notes Editor, and received Exceptional Pro Bono Pledge recognition for completing over 200 hours of pro bono service. I am particularly excited about this clerkship because your commitment to public service is something I hope to emulate in my own career.

My experiences as a law student and as a first-year associate have prepared me for the pace and demands of a district court clerkship. As a student providing eviction defense services in Georgetown's Rising for Justice Clinic, I learned to balance emergency cases with long-term litigation, and I gained extensive writing experience under tight time constraints. As an associate at Kirkland & Ellis, I have become even more familiar with handling district court proceedings in my role on a Bellwether trial team. In my first year, I have deposed a plaintiff involved in a large multidistrict litigation, second-chaired expert depositions, and authored court filings, including motions in limine and a motion to dismiss.

Since beginning law school, I have hoped to one day become a trial lawyer in the Civil Rights Division of the Department of Justice. In service of this goal, I devoted particular attention to civil rights and administrative law as a law student. My academic work related to civil rights includes participating in Georgetown's Election Law Practicum, in which I authored an appellate brief, a federal complaint, and a legal memo on contemporary election law issues. My commitment to this work was recognized with a CALI Award for best final paper. I also completed a research paper under the supervision of Professor Paul Clement on the extent of Congress's power to regulate federal elections under the Elections Clause. Finally, recognizing the interplay of civil rights law and administrative law doctrines, I devoted substantial effort to my administrative law course with Professor Lisa Heinzerling. That work also earned an A+ for the best exam.

It would be an honor to serve as a clerk in your chambers, and I will devote the same energy and care to my clerkship that I did to my law school courses and that I do to my trial work at Kirkland & Ellis.

Respectfully,

Aden MacMillan

Aden Jayne MacMillan

ADEN JAYNE MACMILLAN

1734 T St. NW, Washington, DC 20009 • (913) 205-4277 • ajm@georgetown.edu

EDUCATION

Georgetown University Law Center, Washington, DC
Juris Doctor, May 2021
GPA: 3.86 – Top 10%
Honors: Order of the Coif, *Magna Cum Laude*, Dean's List, Special Pro Bono Recognition for 200 Pro Bono hours
Activities: *American Criminal Law Review* – Senior Notes Editor
Rikers Debate Project – Debate instructor at prison facilities
Juvenile Justice Clinic Defenders – Research Assistant
Supreme Court Institute – Research Assistant
Ballard Spahr – Research Assistant focused on developments in First Amendment doctrine
Homeless Persons Representation Project – Volunteer at expungement clinics

University of Southern California, Los Angeles, CA
Bachelor of Arts, *magna cum laude*, in Journalism and Political Science, May 2018
GPA: 3.89
Honors: Phi Beta Kappa, Dean's List
Activities: USC Annenberg Media – Political Director

EXPERIENCE

Kirkland & Ellis LLP, Washington, D.C.
Associate, September 2021 – Present

- Depose plaintiff involved in large MDL, and second-chair several expert depositions.
- Draft court filings, including a motion to dismiss and an answer to a district court complaint.
- Lead fact-finding efforts in an SEC investigation.

Summer Associate, June 2020-August 2020 (abbreviated two-week summer program)

Rising for Justice, Washington, D.C.
Student Attorney, August 2020 – May 2021

- Represented low-income defendants in eviction cases.
- Wrote a complaint, motion to dismiss, and an answer to a complaint on behalf of several clients, represented individuals in mediations, appeared in status hearings, and lead discovery efforts in a case pending trial.

U.S. Department of Justice, Washington, D.C.
Office of Foreign Litigation, *Intern*, September 2019 – November 2019

- Conducted research for cases involving international law issues, such as treaty disputes and questions regarding foreign sovereign immunity.
- Wrote memoranda about those findings for counsel abroad and other government departments and agencies.

National Courts Section, *Intern,* May 2019 – August 2019

- Drafted court filings, including formal briefs, motions to dismiss, and motions for summary judgment.
- Conducted research for and wrote memoranda on cases involving government contracts, tariff disputes, etc.

Office of Mayor Eric Garcetti, Los Angeles, CA
Communications Intern, May 2018 – August 2018

- Assisted with speechwriting for the Mayor's public appearances.
- Conducted issue research and assisted with message development.

INTERESTS

Songwriter and guitar player, photographer, Kansas City barbeque enthusiast

Record of: Aden Jayne MacMillan
GUID: 810436741

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 09, 2021
Georgetown University Law Center
Major: Law
Honors: Magna Cum Laude
Awards: Order of the Coif

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	95	Civil Procedure Jonathan Molot	4.00	A-	14.68	
LAWJ	002	95	Contracts Anna Gelpern	4.00	A-	14.68	
LAWJ	004	53	Constitutional Law I: The Federal System Paul Smith	3.00	A-	11.01	
LAWJ	005	53	Legal Practice: Writing and Analysis Jarrod Reich	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	40.37	3.67
Cumulative	11.00	11.00	40.37	3.67

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	003	51	Criminal Justice Irving Gornstein	4.00	A	16.00	
LAWJ	005	53	Legal Practice: Writing and Analysis Jarrod Reich	4.00	B+	13.32	
LAWJ	007	95	Property Michael Gottesman	4.00	A-	14.68	
LAWJ	008	95	Torts John Hasnas	4.00	A-	14.68	
LAWJ	1323	50	International Law, National Security, and Human Rights Milton Regan	3.00	A-	11.01	
LAWJ	611	02	Designing Financial Regulation Post-Crisis Jeffery Zhang	1.00	P	0.00	

Dean's List 2018-2019

	EHrs	QHrs	QPts	GPA
Current	20.00	19.00	69.69	3.67
Annual	31.00	30.00	110.06	3.67
Cumulative	31.00	30.00	110.06	3.67

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	126	05	Criminal Law Paul Butler	3.00	P	0.00	
LAWJ	1491	104	~Seminar Mary Novak	1.00	B+	3.33	
LAWJ	1491	106	~Fieldwork 3cr Mary Novak	3.00	P	0.00	
LAWJ	1491	21	Externship I Seminar (J.D. Externship Program) Mary Novak		NG		
LAWJ	165	05	Evidence Michael Gottesman	4.00	A-	14.68	
LAWJ	309	07	Congressional Investigations Seminar Robert Muse	2.00	A	8.00	

Dean's List Fall 2019

	EHrs	QHrs	QPts	GPA
Current	13.00	7.00	26.01	3.72
Cumulative	44.00	37.00	136.07	3.68

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	121	09	Corporations Donald Langevoort	4.00	P	0.00	
LAWJ	1346	05	Supreme Court Practice Seminar Patricia Millett	3.00	P	0.00	
LAWJ	196	05	Free Press Seth Berlin	2.00	P	0.00	
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties Jeffrey Shulman	4.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	13.00	0.00	0.00	0.00
Annual	26.00	7.00	26.01	3.72
Cumulative	57.00	37.00	136.07	3.68

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	178	05	Federal Courts and the Federal System Carlos Vazquez	3.00	A	12.00	
LAWJ	351	07	Trial Practice John Hayes	2.00	A+	8.66	
LAWJ	397	05	Separation of Powers Seminar Paul Clement	3.00	A	12.00	
LAWJ	552	05	Housing Advocacy Litigation Clinic at Rising for Justice, Law Students in Court Division Paul diBlasi		NG		
LAWJ	552	80	~Seminar Paul diBlasi	2.00	A	8.00	
LAWJ	552	81	~Casework Paul diBlasi	3.00	A	12.00	
LAWJ	552	82	~Professionalism Paul diBlasi	2.00	A	8.00	

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	60.66	4.04
Cumulative	72.00	52.00	196.73	3.78

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Aden Jayne MacMillan
GUID: 810436741

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1182	05	Election Law J. Gerald Hebert	4.00	A+	17.32	
LAWJ	1349	08	Administrative Law Lisa Heinzerling	3.00	A+	12.99	
LAWJ	1518	05	Doing Justice: Trial Judges Explain How Tough Decisions Are Made Gregory Mize	2.00	A	8.00	
LAWJ	317	05	Negotiations Seminar Kondi Kleinman	3.00	A	12.00	
LAWJ	361	05	Professional Responsibility Stuart Teicher	2.00	P	0.00	

Dean's List Spring 2021

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	12.00	50.31	4.19
Annual	29.00	27.00	110.97	4.11
Cumulative	86.00	64.00	247.04	3.86

End of Juris Doctor Record

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
MacMillan, Aden, Jayne	6335-7084-19	10-08-2018	1 of 4

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

ISSUE TO:

CONTROL #: 000001485978

RAISED SEAL NOT REQUIRED

This transcript is not valid without the university seal and the signature of the Registrar. A raised seal is not required.

Frank Chang
Registrar

Current Program of Study

02/28/2018 Juris Doctor — Law

USC Degrees Awarded

05/11/2018 Bachelor of Arts — Broadcast and Digital Journalism
Magna Cum Laude

Bachelor of Arts — Political Science

Transfer Credit By Exam

Date:	Units:	Exam:
06/13	4.00	AP: American History
06/13	4.00	AP: English Language/Composition
06/14	4.00	AP: English Literature/Composition
06/14	4.00	AP: Spanish Language

Transfer Detail Information

Undergraduate Units Attempted: 27.00 Earned: 27.00 Available: 27.00 Grade Points: 44.00 GPA: 4.00
Univ Missouri Kansas City Begin: 09/01/2014 End: 12/28/2014 Units Attempted: 11.00
Advanced Placement Credit Begin: 06/01/2013 End: 08/28/2014 Units Attempted: 16.00

USC Cumulative Totals

Undergraduate Units Attempted: 118.0 Earned: 118.0 Available: 118.0 GPA Units: 117.0 Grade Points: 455.30 GPA: 3.89

Parchment

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DN: cn=Parchment, c=US, l=Scottsdale, st=AZ, o=Parchment Inc
Reason: Official Transcript Document
Location: University of Southern California
Date: 2018.10.08 18:30:41 -07'00'

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
MacMillan, Aden, Jayne	6335-7084-19	10-08-2018	2 of 4

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

Spring Semester 2015 (01-12-2015 to 05-15-2015) — Class Level: Freshman

ARLT-100g	A	4.0	Arts and Letters (Cosmopolitan Cultures)
IML-140	A-	2.0	Workshop in Multimedia Authoring (Digital Storytelling and Media Production)
SOCI-142mg	A	4.0	Diversity and Racial Conflict
JOUR-201	A	4.0	History of News in Modern America
GEOL-108Lg	A	4.0	Crises of a Planet

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
18.0	18.0	18.0	71.40	3.96

Fall Semester 2015 (08-24-2015 to 12-16-2015) — Class Level: Sophomore

POSC-120	A	4.0	Comparative Politics
WRIT-150	B+	4.0	Writing and Critical Reasoning--Thematic Approaches (Education and Intellectual Development)
POSC-100	A	4.0	Theory and Practice of American Democracy
JOUR-203	B+	3.0	Newswriting: Broadcast
JOUR-202	A-	3.0	Newswriting: Print

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
18.0	18.0	18.0	66.20	3.67

Spring Semester 2016 (01-11-2016 to 05-13-2016) — Class Level: Sophomore

COMM-322	A-	4.0	Argumentation and Advocacy
POSC-323	A	4.0	Applied Politics (Primaries in Real Time)
POSC-452	A	4.0	Critical Issues in Law and Public Policy (The Feedback Loop in Politics and Public Policy)
JOUR-303	A-	3.0	Reporting: Broadcast
JOUR-302	B+	3.0	Reporting: Print

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
18.0	18.0	18.0	67.80	3.76

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
MacMillan, Aden, Jayne	6335-7084-19	10-08-2018	3 of 4

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

Summer Semester 2016 (05-18-2016 to 08-09-2016) — **Class Level: Junior**

JOUR-205	CR	1.0	Journalism Practicum

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
1.0	1.0	0	0	0.00

Fall Semester 2016 (08-22-2016 to 12-14-2016) — **Class Level: Junior**

COMM-489	A	4.0	Campaign Communication
POSC-452	A	4.0	Critical Issues in Law and Public Policy (The Politics of Rights)
JOUR-321	A	2.0	Visual Journalism
JOUR-309	A-	3.0	Introduction to Online Media

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
13.0	13.0	13.0	51.10	3.93

Spring Semester 2017 (01-09-2017 to 05-12-2017) — **Class Level: Junior**

POSC-456	A	4.0	Women in International Development
POSC-371	A-	4.0	European Political Thought II
JOUR-402	A	4.0	Advanced Television Reporting
JOUR-322	A	2.0	Data Journalism
COMM-371	A	4.0	Censorship and the Law: From the Press to Cyberspace

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
18.0	18.0	18.0	70.80	3.93

UNIVERSITY OF SOUTHERN CALIFORNIA
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STUDENT NAME	STUDENT NUMBER	DATE	PAGE
MacMillan, Aden, Jayne	6335-7084-19	10-08-2018	4 of 4

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

Fall Semester 2017 (08-21-2017 to 12-13-2017) **Class Level: Senior**

POSC-323	A	4.0	Applied Politics (Message and Media: Great Races from City Hall to the White House)
PR-458	A	4.0	Public Relations in Politics and Political Campaigns
POSC-334	A	4.0	Interest Groups and Elite Behavior
JOUR-495	A	2.0	Journalism for Mobile and Emerging Platforms
JOUR-403	A	4.0	Television News Production

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
18.0	18.0	18.0	72.00	4.00

Spring Semester 2018 (01-08-2018 to 05-11-2018) **Class Level: Senior**

WRIT-340	A	4.0	Advanced Writing (Advanced Writing for Arts and Humanities)
IR-330	A	4.0	Politics of the World Economy
JOUR-462	A	4.0	Law of Mass Communication
DANC-362	A	2.0	Pilates Mat Training

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
14.0	14.0	14.0	56.00	4.00

End Of Transcript

ACADEMIC TRANSCRIPT INFORMATION

NOTE: *The information that follows represents current University policies. Questions regarding historical University policies and/or transcript notations should be addressed to the Office of the Registrar. This document contains a number of security features. Further information or authentication can be obtained by calling the Office of the Registrar (213) 740-9230.*

COURSE CREDIT/UNIT VALUE
A semester unit is a credit of one hour per week for one semester (15 weeks in length).

COURSE NUMBERING AND CLASSIFICATION
The first digit of the course indicates the year level of the course: 000-preparatory courses; 100-first undergraduate year; 200-second undergraduate year: 300-third and fourth undergraduate years without graduate credit; 400-third and fourth undergraduate year with graduate credit for graduate students; 500-first graduate year; 600-second graduate year; and 700-third graduate year.

GRADING SYSTEM
The following grades are used: A, excellent; B, good; C, fair in undergraduate courses and minimum passing in courses for graduate credit; D, minimum passing in undergraduate courses; and F, failed. Additional grades include CR, credit; NC, no credit; P, pass; and NP, no pass.
The following marks are also used: W, withdrawn; IP, in progress; UW, unofficial withdrawal; MG, missing grade; IN, incomplete; and IX, lapsed incomplete.

GRADE POINT AVERAGE (GPA) CATEGORIES/CLASS LEVEL
A system of grade points is used to determine a student's grade point average. Grade points are assigned to grades as follows for each unit in the credit value of a course: A, 4.0 points; A-. 3.7 points; B+, 3.3 points; B, 3.0 points: B-, 2.7 points; C+, 2.3 points; C, 2.0 points; C-, 1.7 points; D+, 1.3 points; D, 1.0 point; D-, 0.7 points; F, 0 points; UW, 0 points; and IX, 0 points. Marks of CR, NC, P, NP, W, IP, MG and IN do not affect a student's grade point average.
There are four categories of class level and GPA: Undergraduate, Graduate, Law, and Other. UNDERGRADUATE is comprised of freshman (less than 32 units earned), Sophomore (32 to 63.9 units earned). Junior (64 to 95.9 units earned) and Senior (at least 96 units earned). GRADUATE is comprised of any coursework attempted while pursuing a master's and/or doctoral degree. LAW is comprised of any coursework attempted while pursuing a Juris Doctor or Master of Laws degree. OTHER is comprised of any coursework attempted while not admitted to a degree program or coursework not available for degree credit.

CLASS RANK
The University of Southern California does not calculate or support a class rank for its undergraduate students. While most graduate programs do not rank students, requests for graduate student class rankings should be directed to the dean of the particular school in which the graduate degree was earned.

STUDENT GOOD STANDING
A student is considered to be in good academic standing if they are eligible to register for classes. Disciplinary good standing is determined by the Office of Student Judicial Affairs and Community Standards.

TRANSFER CREDIT
Coursework accepted from other institutions is summarized into undergraduate and graduate areas. The summary information includes the number of units and GPA. The transfer institution(s) and dates of attendance do not appear on the USC transcript.

GOULD SCHOOL OF LAW GRADING SYSTEMS
Beginning in Fall 2012, courses are graded numerically from 4.4 to 1.9, with letter-grade equivalents ranging from A+ to F. The grade equivalents are: 4.4 to 4.1 (A+); 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.1 (C-); 2.0 (D); and 1.9 (F).

From Fall 2001 through Spring 2012, courses were graded numerically from 4.4 to 1.9, with letter-grade equivalents ranging from A+ to F. The grade equivalents were: 4.4 to 4.1 (A+); 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.0 (D); and 1.9 (F).

Prior to Fall 2001, the grading system consisted of numbers in a range from 90 to 65. A grade of 90 was equivalent to highest honors and was very rare; 89 to 85, high honors; 84 to 80, honors; 79 to 70, satisfactory; 69 to 66, unsatisfactory; and 65, failing.

OSTROW SCHOOL OF DENTISTRY GRADING SYSTEM
Students admitted to the Doctor of Dental Surgery program in Fall 1990 or later and students admitted to the International Student Program in Summer 1991 or later, are bound by the University's grading system (excluding plus/minus grades), which is detailed *above* under the heading "GRADING SYSTEM." Academic records for dentistry students who attended prior to the dates listed above are housed independent of the University's central record system. Contact the Ostrow School of Dentistry directly for this earlier academic record information.

KECK SCHOOL OF MEDICINE TRANSCRIPTS
Transcripts for medical students are housed independent of the University's central records system. Contact the School of Medicine directly for this academic record information.

ACCREDITATION
The University of Southern California is fully accredited by the Western Association of Schools and Colleges. For additional professional accreditation information, please refer to the latest issue of Accredited Institutions of Postsecondary Education published by the American Council on Education on Postsecondary Accreditation (COPA).

Rev. 7/2012

University of Southern California
Authentication of Official Documents Delivered Electronically

This document has been transmitted electronically to the recipient specified by the owner of the record. If you are not the intended recipient, please notify the Registrar's office at the University of Southern California 213 740-7445 or gtv@usc.edu. Release of this record or disclosure of its contents to any third party without written consent of the record owner is prohibited.

This document has been digitally signed and therefore contains special characteristics. When this document is viewed through Adobe Reader versions 6.0 or higher or through Adobe Acrobat versions 6.04 or higher, it will reveal that a digital signature has been applied to the document. A pop-up screen or status bar will indicate whether the document is either valid, invalid, or whether the signer of the document is unknown and other measures must be taken to authenticate the document. In addition the pop-up screen allows for further examination of the digital signature, allowing you to authenticate the origin of the document.

A **valid** signature means that the document's contents have not been changed or altered in any way. Also, when the pop-up screen or status bar displays a message that the digital signature is **valid** it means that the author of the document is known to the certification authority and the person or institution represented by the digital signature is true and authentic. A document that contains a digital signature that can be instantly validated will display a **blue ribbon** on the pop-up screen or status bar and in the lower left corner of the frame of the application

An **invalid** signature display means either the digital signature is not authentic, or the document has been altered. Sometimes the digital signature has been revoked for some reason, or that it has expired. A document with an **invalid** display should be **rejected**.

A third possible message, **Author Unknown**, can have two possible meanings: the digital signature cannot be validated due to a disconnection to the internet, or that the digital signature cannot be instantly validated via the internet. If you receive this message make sure you are properly connected to the internet. If you have a connection and you still cannot validate the digital signature on-line, **reject** this document.

March 06, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write enthusiastically and without reservation to recommend Aden MacMillan for a clerkship position with your chambers.

Aden was a student in my year-long Legal Practice: Writing and Analysis ("LP") class at the Georgetown University Law Center during the 2018-19 academic year. Over the course of her year in my LP class in particular and at Georgetown in general, Aden demonstrated that she is a skilled and thoughtful researcher and writer, as well as a conscientious, hardworking student; in fact, she was perhaps my most improved student over the course of the year. Impressively, and unlike most students I have taught over the years who seek only to learn what it takes to receive a good grade, Aden genuinely strives to better understand and to improve upon her writing, research, and lawyering skills so that she can be a better student and lawyer.

Aden's work ethic for my class and beyond is unparalleled. In addition to her exceptional performance in my class, I have learned a great deal about Aden's academic and intellectual acumen through my interactions with her outside of class over the past four years. For instance, I am aware that she graduated magna cum laude from the University of Southern California and is in the top 15% of her class at the Law Center. Further, while at the Law Center, she was the Senior Notes Editor of the prestigious American Criminal Law Review (for which her Note was published) as well as a research institute for the Supreme Court Institute.

Most notably, however, is Aden's commitment to promoting social justice and serving the public interest. For example, she has externed with both the National Courts and Foreign Litigation Sections of the Department of Justice. Additionally, she has volunteered her time helping refugees, the homeless, and incarcerated individuals. In particular, while in college, she was an intern with the International Rescue Committee, and at Georgetown, she has provided legal services for the homeless in expungement actions and teaches debate classes at prison facilities. In short, she has not only "talked the talk" about promoting social justice, but she has "walked the walk" to provide assistance to the most vulnerable among us.

In addition to her work in the classroom, I have gotten to know Aden on a personal level over the past four years. She is a person of high character and integrity, is likeable, and is unflappable in the face of stress. She is driven to succeed in all avenues of life. Moreover, we have had several conversations about a variety of legal issues—including those related to contemporary legal issues, her course or outside work, and even my cases from my prior law practice—during which Aden has demonstrated a high level of thoughtfulness and care in developing and articulating her positions and/or posing questions in a manner beyond most law students.

As myself a former law clerk and supervisor of judicial externs, I understand how important a law clerk is to the functioning of chambers. I am confident that Aden will be a stellar law clerk. I have no doubt that she will bring to that position not only her strong research and writing skills, but also the professionalism, dedication, enthusiasm, and passion for justice that I have seen in her. For these reasons, and the reasons set forth above, Aden MacMillan possesses all of qualities that a young lawyer needs to succeed in practice and beyond. Accordingly, I highly recommend her for a position with your chambers.

Please do not hesitate to contact me if you need any further information.

Very truly yours,

Jarrod F. Reich

Jarrod Reich - jarrod.reich@law.georgetown.edu - 202-662-9875

Rising for Justice
901 4th Street, NW, Suite 6000
Washington, DC 20001

March 07, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It gives me great satisfaction to recommend Aden MacMillan for a judicial clerkship. Knowing her as I do, I am certain Aden will exhibit the same competence and work ethic as a judicial clerk that she did as a student attorney in the Rising for Justice Housing Advocacy and Litigation Clinic.

Aden was one of six student attorneys I supervised during her time in clinic and she stood out. The clinic provides legal representation to low-income tenants in the District of Columbia. The level of commitment Aden dedicated to her clinic work was impressive. As a student attorney, Aden spent hundreds of hours advocating for her clients, and regularly appeared before judges in D.C. Superior Court. Over the course of the year she authored a motion to dismiss, a tenant petition, and an answer with a jury demand, among other things. She also conducted discovery in a case pending trial, independently negotiated several matters on behalf of clients, and spent hours communicating with clients, opposing counsel, and government employees as she managed her cases. Not only will she bring courtroom experience beyond her years to this clerkship, her comfort and professionalism in courtroom settings will make her an outstanding clerk.

Aden consistently produced quality work and demonstrated strong writing skills. She was extremely proficient in analyzing legal problems and was creative in advocating solutions for clients. Her clients also benefited from her competent legal research. She was deft in the courtroom and quick on her feet.

Aside from the quality of her work, Aden stood out in the clinic because of her determination to leave her clients in a better position than she found them, catering to their needs even when they did not relate directly to legal problems. While she was on winter break, for example, Aden had several phone conversations with an elderly client who was experiencing isolation during the COVID-19 pandemic. Sensing her loneliness, Aden spent several hours on the phone with her, trying to be a source of comfort and support. In another display of her commitment to her clients, Aden chose to continue representing her clients for a full semester after her official time in the clinic came to an end. I have no doubt that Aden will bring the same level of drive and dedication to her work as a law clerk.

Aden was an aspiring journalist prior to Georgetown, but came to law school to advocate for the most vulnerable among us in a more direct way, and she has spent much of law school doing just that. In addition to the clinic, Aden volunteered at expungement clinics to help people experiencing housing instability clear their records, she taught debate classes at a prison in Maryland, and she conducted research for police reform as a research assistant for Georgetown Law's Juvenile Justice Clinic.

It is so rewarding to work with students like Aden and I recommend her without hesitation because I know she will be a great addition to any legal staff she joins.

Respectfully,

Daniel M. Clark
Tenant Justice Program Director

Dan Clark - dclark@risingforjustice.org - 703-785-1389

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

March 06, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a Professor of Law at the Georgetown Law Center and the Executive Director of the Supreme Court Institute. Aden MacMillan was a student in one of my classes and served as one of my summer research assistants. Based on my experience with her, I highly recommend her for a clerkship.

Aden first came to my attention as a student in my first-year Criminal Justice Class. She was one of the stars in the class. She was always prepared and consistently offered valuable insights. On the final exam, she wrote on of the top exams in the class, demonstrating a complete mastery of the material, and strong writing and analytical skills. She far surpassed the level for receiving an A.

After her first year, Aden served as one of my four summer research assistants. Her job was to prepare summaries of cases that the Supreme Court had agreed to hear in the following term. Many of the cases fell into complex areas of the law as to which Aden had no prior experience. Yet her summaries displayed a perfect grasp of the essential issue in the case, and she presented the case in a way that anyone could understand. Her summaries were uniformly a joy to read.

Aden is also well prepared for a clerkship. She graduated magna cum laude with a 3.86 average. She was a Senior Note Editor on the American Criminal Law Review. She has interned in the Department of Justice. And she is currently an Associate at Kirkland & Ellis.

Finally, based on my experience with Aden, I am confident she could fit into any chambers. She is hard-working, poised under pressure, a pleasure to be around, and gets along with everyone. In sum, I recommend Aden for a clerkship without the slightest hesitation.

Sincerely,

Irv Gornstein

Irv Gornstein - ilg@law.georgetown.edu

ADEN JAYNE MACMILLAN WRITING SAMPLE

I wrote the following brief for Georgetown's Election Law Practicum. The brief appeals the Middle District of Tennessee's 2020 decision in *Lichtenstein v. Hargett*.

At issue in the case was a Tennessee statute that makes it illegal for any third party other than a state election commission employee—be it a family member, friend, or voter mobilization group—to give an absentee-ballot application to another individual. The district court upheld the law. This brief appealing the district court's decision argues that the law abridges Appellants' freedom of speech under the First Amendment.

I earned a CALI Award for my work on this assignment. The writing is my own and has not been edited by others.

No. 3:20-cv-00736

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LICHTENSTEIN, ET AL.,

Plaintiffs-Appellants,

v.

HARGETT, ET AL,

Defendant-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee, Nashville Division
Honorable Eli J. Richardson

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF ISSUES

Whether the district court erred in denying Appellants' motion for a preliminary injunction to enjoin Tennessee Code § 2-6-202(c)(3), which bans distribution of absentee ballot applications by anyone who is not an election commission worker, thereby prohibiting Appellants from using the applications as a means of encouraging others to vote.

STATEMENT THE CASE

Plaintiff-Appellants (hereinafter "Appellants"), consisting of four organizations and one individual, appeal the U.S. District Court of the Middle District of Tennessee's denial of their motion for a preliminary injunction. Appellants seek to enjoin Tennessee Code § 2-6-202(c)(3), which prohibits them from distributing absentee ballot applications as part of their voter mobilization activities.

Tennessee Code § 2-6-202(c)(3) ("the Law") makes it a Class E felony for anyone other than state election commission employees "to give[] an application for an absentee ballot to any person." Tenn. Code Ann. § 2-6-202(c)(3). Anyone can access absentee ballot applications either directly from county election offices or online from the Secretary of State's website or county election office websites. *See Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 785 (M.D. Tenn. 2020). But the State has interpreted the Law strictly, prohibiting *any* third party from distributing the applications. In practice, then, if you have a printer and internet access, you can print yourself as many absentee ballot applications as you would like. But if your printer breaks and your neighbor prints the application for you, your neighbor has committed a felony. *See* Plaintiffs' Motion for a Preliminary Injunction at n.6 [hereinafter MPI].

Appellants A. Philip Randolph Institute (APRI), The Equity Alliance (TEA), Free Hearts, Memphis Central Labor Council (MCLC), and the Tennessee State Conference of the NAACP

are nonprofit organizations that dedicate significant time and resources toward voter outreach and voter mobilization efforts in Tennessee. *See* Compl. at ¶ 7-12. Their voting-related activities include voter registration drives and other voter education events to encourage voter turnout. *Id*. Through this work, Appellants seek to impart to Tennesseans the importance of civic participation through voting, while easing the barriers that can make it difficult to exercise this fundamental right. *See* MPI at 8, 11.

Similarly, Appellant Jeffrey Lichtenstein, a labor organizer and the Executive Secretary of MCLC, is involved with voter mobilization activities, including distribution of voter registration forms to members of MCLC and members of his community. *See* Compl. at ¶ 6. He would like to distribute absentee ballot applications as part of his voter engagement efforts. *Id.*

Educating voters about absentee voting is part of Appellants' voter outreach and mobilization activities. *See* Compl. at ¶ 26. They have found that these efforts are most effective when they are able to ease burdens associated with voting. *Id*. One way they accomplish this goal is by providing individuals with the forms they need to vote, which, of course, includes absentee ballot applications. *Id*.

In light of the COVID-19 pandemic, Appellants sought to direct additional time and resources to help people vote absentee in the 2020 election. *See* Compl. at ¶¶ 6-12. The COVID-19 pandemic has heightened the need for absentee voting, as many people are unable or unwilling to risk the dangers associated with COVID-19 to vote in person. *See* MPI at 6. In fact, Tennessee has seen its highest absentee voter turnout to date, with 210,428 voters voting absentee in the 2020 election. Tenn. Sec'y of State, *Early and Absentee Voters for the November 3, 2020 General Election* (2020). Appellants hoped to help meet the demand for absentee ballots

by providing both solicited and unsolicited absentee ballot applications to Tennessee voters, but have been unable to under Tennessee law. *See* Compl. at ¶ 29.

Appellants' need to promote absentee voting will not end with the 2020 election, however. *See* Compl. at ¶ 26. The increased popularity of absentee voting will likely continue long past the end of the COVID-19 pandemic. Absentee voting was already on the rise before the 2020 election, increasing by nearly 40% between the 2000 and 2016 elections. *See* Tenn. Sec'y of State, *Statistical Analysis of Voter Turnout for the November 7, 2000 Election* (2000); Tenn. Sec'y of State, *Statistical Analysis of Voter Turnout for the November 8, 2016 Election* (2016). Appellants' need to encourage absentee voting will only grow as future elections take place.

Appellants filed a motion for a preliminary injunction on August 31, 2020 in the U.S. District Court for the Middle District of Tennessee against Defendant-Appellees Tennessee Secretary of State Tre Hargett, Coordinator of Elections Mark Goins, and District Attorney of Shelby County, Tennessee Amy Weirich, in their official capacities. *See* MPI. Appellants sought to enjoin the State from enforcing § 2-6-202(c)(3). *Id*.

On September 23, 2020, the district court denied the motion, concluding that Appellants did not satisfy the factors for a preliminary injunction. *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742 (M.D. Tenn. 2020). The district court first found that Appellants were unlikely to succeed on the merits because § 2-6-202(c)(3) does not burden First Amendment speech. *Id.* at 24. Though it acknowledged that conduct can constitute speech, it concluded that distributing absentee ballot applications is not speech because "the intended recipient would not in all likelihood understand" one particular message from the conduct. *Id.* at 18. It went on to conclude that, even if the Law does prohibit some First Amendment speech, it does not prohibit "core political speech and thus [is] not...subject to" strict scrutiny under *Meyer v. Grant* and *Buckley v. American Constitutional*

Law Foundation because "the Law does not in any way, shape, or form hinder the ability to discuss candidates or issues." *Id.* at 774.[1]

As to the remaining factors required for a preliminary injunction, the court concluded that, because it found Plaintiffs were unlikely to succeed on the merits, "the other factors fall against" them as well. *Id*. Without conducting a separate analysis as to these remaining factors, it held that: 1) the State would suffer irreparable harm if the Motion were granted; 2) the balance of equities weighs in favor of the State; and 3) the injunction would not be in the public interest. *Id.* at 788.

SUMMARY OF THE ARGUMENT

The district court abused its discretion in denying Appellants' motion for a preliminary injunction. First, there is a strong likelihood that Appellants will succeed on the merits of their First Amendment claims. Appellants wish to distribute absentee ballot applications as part of their voter mobilization efforts. These efforts intend to encourage individuals to vote by conveying the importance of civic engagement. Appellants' desired conduct is thus core political speech, subjecting any law that burdens it to strict scrutiny. This exacting requirement is not met here, as § 2-6-202(c)(3) bears no relationship to the interests it purports to serve. Even if it did, it would not be narrowly tailored to serve those interests. Moreover, because of the disconnect between the State's asserted interests and the Law, it cannot even withstand rational basis review.

[1] In dicta, the district court reached several additional conclusions that Appellants did not raise in their Motion. First, the court explained that, even if the Law prohibited some First Amendment speech, thereby implicating the *Anderson-Burdick* framework, the Law would not be unconstitutional because, in the court's view, it imposes only a "light" burden on Plaintiff-Appellants. *Id.* at 28-29. Next, using a "rational-basis plus" analysis, the court found "there is a plausible connection between the Law and the asserted state interests." *Id.* at 782.

Second, Appellants face irreparable harm without a preliminary injunction. Appellants conduct voter engagement activities for every election, and absentee voting is only gaining in popularity in the State. Absent a preliminary injunction, not only will Appellants suffer irreparable harm in the 2020 election, they will continue to suffer it with every coming election as litigation proceeds.

Third, granting a preliminary injunction is in the public interest, which is served when courts protect a party's constitutional rights from being violated. Further, the state will not suffer any consequential injury if the injunction is granted.

STANDARD OF REVIEW

In granting a preliminary injunction, a court considers: 1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury without the injunction; 3) whether issuance of the injunction would cause substantial harm to others; and 4) the impact on the public interest. *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (2001). The Court "review[s] a district court's decision to grant or deny a preliminary injunction for an abuse of discretion." *McGirr v. Rehme*, 891 F.3d 603, 610 (2018). Under this standard, the Court "review[s] the district court's legal conclusions *de novo* and its factual findings for clear error." *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). The district court's determination of the likelihood of success on the merits is a question of law and is reviewed de novo. *Id.*

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION

All four factors for granting a preliminary injunction favor Appellants. First, there is a strong likelihood that Appellants will succeed on the merits of their First Amendment claims

because § 2-6-202(c)(3) unconstitutionally infringes their right to free speech, and Appellees have failed to carry their burden of showing that the Law is narrowly tailored to further a compelling state interest. Second, Appellants will suffer irreparable injury unless the injunction is issued. Third, the injunction will serve the public interest because it would enjoin a law that infringes upon First Amendment rights. Finally, Appellees will not suffer substantial injury if the injunction is granted because the Law in no way furthers their asserted interests.

A. Appellants Have a Substantial Likelihood of Success on the Merits

Appelants' distribution of absentee ballot applications carries a clear message related to the importance of civic engagement. Such a message is core political speech, which the First Amendment vigorously protects. The Law is therefore subject to strict scrutiny, meaning it must be narrowly tailored to serve a compelling state interest. The Law fails this demanding test. Moreover, the Law does not even satisfy rational basis review because it is not rationally related to the State's asserted interests.

1. The Law Prohibits Appellants from Engaging in Core Political Speech in Violation of their First Amendment Rights

"The First Amendment affords the broadest protection to. . . political expression in order to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Core political speech, which "involves. . . interactive communication concerning political change," constitutes such expression. *Meyer v. Grant*, 486 U.S. 414, 422 (1988); *see also Buckley v. Am. Cons. Law Found*, 525 U.S. 182 (1999). The First Amendment protects expressive political conduct as well as speech. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).

"[N]ot every variety of core political speech has been clearly catalogued," though it has often involved "pre-election activity." *Turner v. District of Columbia Bd. of Elections*, 77 F.

Supp. 2d 25, 31 (D.C. Cir. 1999). This is true of absentee ballot application distribution, particularly because no other state prohibits such conduct. *See Lichenstein*, 489 F. Supp. 3d at 20. But other courts have characterized similar conduct as core political speech. For example, in *Voting for America v. Steen*, the Fifth Circuit held that "distributing voter registration forms" involves speech. 732 F.3d 382, 389 (5th Cir. 2013). And in *Voting for America v. Andrade*, the Fifth Circuit explained that "voter registration activity that urges citizens to vote" is "protected expressive conduct." 488 Fed. App'x 890, 898 (5th Cir. 2012). Finally, in 2019, the district court itself held that voter registration drives are core political speech, and explained that "'encouraging others to vote' is 'pure speech,' that is a 'core First Amendment activity.'" *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 725-27 (M.D. Tenn. 2019).

Similarly, distributing absentee ballot applications would allow Appellants to encourage others to vote. Appellants do not encourage others to participate in elections because voting is good for one's health.[2] Rather, the message implicit in Appellants' advocacy is that voting is a civic duty and an impetus for political reform. *See* MPI at 11. This is the essence of "interactive communication concerning political change," which in turn constitutes "core political speech." *See Meyer*, 486 U.S. at 422. The message is conveyed with equal force whether a person is distributing a blank voter registration form, as in *Steen*, or a blank absentee ballot application, as here. The medium for delivering the message may change, but it is the message implicit in the conduct that matters.

The district court held that the Law does not prohibit core political speech because "the Law does not. . . hinder the ability to discuss candidates or issues, including any issue relating in

[2] The district court repeatedly asserts the idea that "an observer would not have any particular reason to associate any specific message with the action of giving someone an absentee-ballot application." *Lichtenstein* 489 F. Supp. 3d at 768. But, as discussed later, the clear message behind such conduct is the desire that the recipient vote.

any way to. . . voting absentee." *Lichtenstein*, 489 F. Supp. 3d at 775. This reasoning ignores that the Law does, in fact, obstruct Appellants' ability to convey their message through their desired means. In the court's view, though, "Plaintiffs' message. . . can be conveyed in every single way imaginable except by distributing absentee ballots." *Id.* at 773. But "that [Appellants] remain free to employ other means to disseminate their ideas does not take their speech. . . outside the bounds of First Amendment protection." *Meyer*, 487 U.S. at 424. In fact, under the First Amendment, Appellants have the "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 424. Based on their experience, Appellants have concluded that distributing absentee ballot applications is the most effective way to ensure individuals actually vote. *See* Compl. at ¶ 27.

The district court concluded that, far from warranting the protection associated with core political speech, distributing absentee ballot applications does not amount to protected First Amendment speech at all. *See Lichenstein*, 489 F. Supp. 3d at 773. It reasoned that the act of distributing an application is not inherently expressive conduct because there is "no great likelihood" that a recipient would understand the message Appellants wish to convey. *Id.* at 767. But their message is clear: They want others to vote.

There are two reasons this message would be widely understood. First, the application itself has a single purpose: to allow individuals to vote absentee. A reasonable person, upon receiving an application from Appellants, would recognize that singular purpose and understand that the distributor is encouraging the individual to vote. Second, Appellants conduct voter engagement activities when elections are approaching. *See* MPI at 6. With an election on the

horizon, a reasonable person would conclude that Appellants are distributing the applications because they want people to participate in the upcoming election.[3]

In its explanation to the contrary, the district court proposed alternative messages that a recipient could intuit upon receiving an absentee ballot application, including the distributor's desire that the recipient "throw [the application] away." *Id.* at 768. Certainly, any expressive conduct taken entirely out of context could stand for any variety of messages. For example, the district court points to distribution of political leaflets as conduct protected by the First Amendment. *See id.* at 767. But ignoring the purpose of the leaflet could lead to precisely the same conclusion the district court drew with respect to the applications: that handing out a "piece of paper" is a signal that the distributor is asking the recipient to "please throw this away." *See id.* at 768. This is essentially what the district court's alternative messages do: They ignore the central purpose of what the applications are, who is distributing them, and when they are being distributed.

Context matters in the leaflet example, and context matters here. As the district court itself noted "whether. . . distribution actually is speech in a particular situation depends on what is being distributed, why it is being distributed, and how such distribution would reasonably be perceived." *Id.* at 766-67. The standard for finding expressive conduct is, in part, whether "the likelihood was great that the message would be understood by those who viewed it," *not* whether there is absolutely no other message an individual could possibly discern. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). There is a great likelihood that, upon receiving an absentee ballot from Appellants, a reasonable individual would understand Appellants' precise goal and message.

[3] Though the message behind Appellants' distribution of applications stands on its own, the applications are also sent with other voter information materials, including information about absentee voting. MPI at 7. If nothing else, individuals will understand Appellants message based on the additional literature with which the applications come.

The wholesale ban on application distribution thus imposes a severe burden on Appellants' First Amendment speech rights and is subject to strict scrutiny.

2. Tennessee's Ban on Absentee Ballot Application Distribution Is Not Narrowly Tailored To Achieve A Compelling Government Interest

"Laws that burden political speech are. . . subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[4] *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). Strict scrutiny applies because § 2-6-202(c)(3) bans core political speech. Thus "[t]he statute trenches upon an area in which the importance of First Amendment protections is 'at its zenith,'" and the government must overcome a burden that "is well-nigh insurmountable." *Meyer*, 486 U.S. at 425.

Appellees identify their interest in the Law as "preventing voter confusion" and "preserving the integrity of the ballot box." *See Lichenstein*, 489 F. Supp. 3d at 781. Quoting this Court's opinion in *Emery v. Robertson Cty. Election Commission,* Appellees assert that § 2-6-202(c)(3) is necessary because "the purity of the ballot is more difficult to preserve when voting absent than when voting in person." Defendant's Reply In Opposition at 18. But Appellees fail to explain *how* limiting the absentee voting process to two parties actually preserves "the purity of the ballot." *See id.*

To close the gap between Appellees' asserted interests and the Law, Appellee Goins's declaration asserts several risks associated with third party distribution of absentee ballot applications, including: 1) the distribution of pre-filled applications; 2) voters receiving multiple applications and submitting several copies to election offices; and 3) the inclusion of incorrect

[4] Though the district court correctly identified strict scrutiny as the applicable standard under the *Meyer-Buckley* framework, it erroneously found the framework is inapplicable. *See* Lichenstein, 489 F. Supp. 3d at 774.

instructions on how to complete the applications. *Lichtenstein*, 489 F. Supp. 3d at 783-84. Erroneously applying "rational-basis plus" review, the district court found that the Law could plausibly address those risks, and is thus rationally related to the government's interests in avoiding voter confusion and preserving the integrity of the ballot. *Id.* at 782. But the government's proffered justifications fail for three primary reasons.

First, the Law does not actually address the stated risks. Take the first risk identified above: that third parties could distribute pre-filled absentee voter applications. Importantly, under the State's laws, third parties are permitted to fill out certain portions of the applications for others. *See* Tenn. Code § 2-6-203. If the State's concern is that applications will be fraudulently or incorrectly completed, the Law does not actually target that concern in any way because it does not prevent third parties from filling out the applications.

Second, there are other protections in place that sufficiently guard against the stated risks. For example, the State has procedures in place for processing absentee ballot applications and dealing with irregularities that arise in order to address the asserted risk that voters could receive multiple applications and submit several copies to election offices. Appellees argue that voters sending multiple applications to election offices would "cause[] administrative problems" for election commissioners. *Lichenstein*, 489 F. Supp. 3d at 783. But they also explain that, as normal operating procedure, once applications to vote absentee are received, county election commission workers record the information and document when they send absentee ballots to voters. *See* Defendant's Reply at 19. In the event that a voter did send in multiple applications, an election worker would see that a previous absentee application had been processed, and the worker could simply discard the additional application. Finding that a voter has previously submitted an absentee ballot through a review process that election workers have to conduct even

with § 2-6-202(c)(3) in place imposes no new burden on the state, and certainly not one that justifies a wholesale ban on Appellants' political speech. *See Meyer*, 486 U.S. at 426-27 (holding challenged procedures unnecessary where other existing procedures were "adequate to. . . minimiz[e] the risk of improper conduct.").[5]

Similarly, there are already procedures in place to address the problem of pre-filled ballots: voters must sign applications themselves under penalty of perjury. *See* Tenn. Code §§ 2-6-203, 2-19-105. *See also* Citizens for Tax Reform v. Deters, 518 F.3d 375, 388 (6th Cir. 2008) (overturning a law that restricted payment for signature gathering on election-related petitions to time worked, reasoning, that "Ohio already has criminalized election fraud," and its signature laws were adequate to deter fraud).

Finally, the government's proffered interests do not save § 2-6-202(c)(3) because it is not narrowly tailored to achieve those interests. The State's interest in preventing voter confusion, which the State says could be caused by third party distributors providing incorrect instructions on how to fill out applications, is an example. This problem could be remedied in several ways. For instance, the government could require distributors to include pre-prepared instructions written by the county election offices. The district court itself noted that the Law is not narrowly tailored to satisfy strict scrutiny and offered several narrower alternatives. *Lichtenstein*, 489 F. Supp. 3d at 784.

Tennessee Code § 2-6-202(c)(3) is unrelated to the interests Appellees assert. Even if it were, it is not narrowly tailored to achieve those interests. The Law infringes upon Appellants' free speech rights and does not withstand the "most exacting" scrutiny applicable here. *See Boos*

[5] And, as the district court noted, the State has "obviated" any need to limit applications to one per voter by making the applications widely available online, again demonstrating how the Law is unrelated to State interests. *Id.* at 786.

v. Barry, 485 U.S. 312, 321 (1988). Appellants are thus likely to succeed on the merits of their claims.

B. Appellants Will Suffer Irreparable Harm

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for America v. Hustad*, 697 F.3d 423, 436 (2012). It follows, that "loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Appellants' First Amendment speech rights have been abridged, and they will suffer irreparable harm without an injunction.

Moreover, the harm is imminent. If their efforts to encourage absentee voting continue to be stymied, Appellants' harm will not end with the 2020 election. At least every two years, Tennesseans have the opportunity to make their voice heard in state and federal elections. As surely as free elections will continue, so too will Appellants' efforts to encourage individuals to vote. *See* Compl. ¶ 22. With absentee voting increasing in popularity, Appellants will suffer irreparable injury with each coming election cycle as litigation continues. *See supra* at 3.

C. A Preliminary Injunction Will Serve The Public Interest and Appellees will Not Suffer Substantial Harm

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Connection Distributing Co.*, 154 F.3d at 288. Because "the public as a whole has a significant interest in ensuring . . . protection of First Amendment liberties," the public interest is "advanced by issuance of a preliminary injunction enjoining enforcement of those portions of the. . . [Law] that are of questionable constitutionality." *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (1995). Here, a preliminary injunction would serve the public interest by enjoining a law that violates the First Amendment.

Because the Law is unrelated to any of the interests it purports to serve, a preliminary injunction would not lead to any burdens that would harm the State's interest in election integrity. In fact, far from harming the State's interests, it would further them, as both the State and Appellants wish to encourage robust voter participation, including through absentee voting. *See* MPI at 15.

Because each preliminary injunction factor favors Appellants, and because the burden on Appellants' First Amendment rights heavily outweighs any burden on Appellees, the balance of equities, too, weighs in their favor.

Conclusion

For these reasons, Appellants respectfully request that the Court reverse the district court and grant Appellants' Motion for a Preliminary Injunction.

Respectfully submitted,

Aden J. MacMillan
Counsel for Appellants
Georgetown University Law Center
600 New Jersey Ave. N.W.
Washington, DC 20001
(913) 205-4277
ajm375@georgetown.edu

Applicant Details

First Name	**Jordyn**
Last Name	**Manly**
Citizenship Status	**U. S. Citizen**
Email Address	**jrm589@cornell.edu**
Address	**Address** Street **301 E. State St.** City **Ithaca** State/Territory **New York** Zip **14850** Country **United States**
Contact Phone Number	**6072799100**

Applicant Education

BA/BS From	**Simon Fraser University, Canada**
Date of BA/BS	**June 2019**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 14, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Langfan Family First-Year Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hans, Valerie
vh42@cornell.edu
607-255-0095

McKee, Estelle
emm28@cornell.edu
(607) 255-5135

Yale-Loehr, Stephen
swy1@cornell.edu
607-254-4759

This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 11, 2022

Jordyn Manly
301 E. State St., Apt. #807
Ithaca, NY 14850
jrm589@cornell.edu | (607) 279-9100

The Honorable Lewis J. Liman
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judge Liman,

I am a third-year student at Cornell Law School and wish to apply for a clerkship in your chambers for the 2024-2025 term or any term thereafter. My desire to begin my career in New York City and family ties to the state make the United States District Court for the Southern District of New York an ideal place to hone my legal research and writing skills while providing me with a unique perspective of advocacy from the eyes of the judiciary.

By participating in various clinics and practicums during my time at Cornell Law School, I have gained significant experience with collaborative and detail-oriented work and have developed my research, writing and analytical skills. As a General Editor for the Cornell Law Review, I was able to further refine these skills while writing my Note, entitled *Policing the Police Under 42 U.S.C. § 1983: Rethinking Monell to Impose Municipal Liability on the Basis of Respondeat Superior*, which will be published this March. Over the past two summers, I have been able to draw upon both my academic and previous work experience to demonstrably strengthen my research and writing skills while working as a judicial intern for the Eastern District of New York and, more recently, as a Summer Associate in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison LLP. I am confident that my legal research and writing capabilities, project management skills, and collaborative nature will allow me to make a meaningful contribution to your chambers.

Enclosed please find a resume, law school transcript, undergraduate transcript, writing sample, and letters of recommendation from Cornell Law School Professors Hans, McKee, and Yale-Loehr. Should you require additional information, please do not hesitate to contact me.

Thank you for your time and consideration.

Sincerely,

Jordyn Manly

Jordyn Manly

301 E. State St., Apt. 807, Ithaca, NY 14850 | 607-279-9100 | jrm589@cornell.edu

EDUCATION

Cornell Law School – Ithaca, NY — May 2022
Candidate for Juris Doctor

GPA: 3.94; (#5 in class and top 5%)
Honors: Cornell Law Review – *General Editor*
CALI Awards (Immigration & Refugee Law; Social Science and Law)
Activities: Constitutional Politics; Nature and Functions of Law; Psychology and Law – *Teaching Assistant*
Jewish Law Students Association – *Treasurer*
Student Animal Legal Defense Fund – *Vice President*

Simon Fraser University – Burnaby, BC — May 2019
Bachelor of Arts, Major in Criminology, Certificate in Police Studies

GPA: 3.83
Honors: Dean's Honor Roll (GPA above 3.5); President's Honor Roll (GPA above 4.0)
Activities: Hi F.I.V.E. Movement for Mental Health – *Event Coordinator*
Special Olympics – *Volunteer*

EXPERIENCE

Paul, Weiss, Rifkind, Wharton & Garrison LLP – New York, NY — May – July 2021
Summer Associate

- Researched and drafted briefs and memoranda in a wide variety of civil litigation matters including employment disputes, ERISA proceedings, trade secret actions, FOIA appeals, and class action lawsuits
- Participated in weekly FTCA class action settlement negotiations with the Department of Justice on behalf of families separated at the border

Honorable Ann M. Donnelly
United States District Court for the Eastern District of New York – Brooklyn, NY — May – August 2020
Judicial Intern

- Wrote memoranda, draft decisions, and draft orders on motions to dismiss and motions for judgment on the pleadings

Ministry of the Attorney General, Crown Attorney's Office – Toronto, ON — June – August 2019
Summer Intern, Homicide Division

- Examined witness statements, evidence, and police statements to determine strength of Crown's case
- Assisted senior counsel in negotiating guilty pleas with opposing counsel

Greenspan Partners LLP – Toronto, ON — Summers 2015 – 2018
Summer Law Student

- Conducted one-on-one witness interviews and assisted in client-intake interviews
- Performed extensive legal research to identify potential criminal-defense strategies for clients
- Engaged in trial preparation: reviewed disclosure, wrote memoranda of law, and composed questions for cross-examination

PUBLICATIONS

Jordyn Manly, Note, *Policing the Police Under 42 U.S.C. § 1983: Rethinking Monell to Impose Municipal Liability on the Basis of Respondeat Superior*, 107 CORNELL L. REV. (forthcoming)

Cornell Law School - Grade Report - 01/24/2022

Jordyn R Manly

JD, Class of 2022

Course	Title	Instructor(s)	Credits	Grade	
Fall 2019 (8/27/2019 - 12/23/2019)					
LAW 5001.3	Civil Procedure	Gardner	3.0	A-	
LAW 5021.2	Constitutional Law	Tebbe	4.0	A	
LAW 5041.2	Contracts	Hillman	4.0	A	
LAW 5081.5	Lawyering	McKee	2.0	A-	
LAW 5151.2	Torts	Heise	3.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.8968
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.8968

^ Dean's List

Spring 2020 (1/14/2020 - 5/11/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 5001.1	Civil Procedure	Cavanagh	3.0	SX	
LAW 5061.3	Criminal Law	Ohlin	3.0	SX	
LAW 5081.5	Lawyering	McKee	2.0	SX	
LAW 5121.3	Property	Underkuffler	4.0	SX	
LAW 6822.1	Social Science and the Law	Hans	3.0	SX	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	0.0	0.0	N/A
Cumulative	31.0	31.0	31.0	31.0	16.0	16.0	3.8968

Fall 2020 (8/25/2020 - 11/24/2020)

LAW 6002.1	Bioethics: From Nuremberg to Modern Times	Obasogie	1.0	A	
LAW 6433.101	Ethics in Policing	Gagan	3.0	A-	
LAW 6511.1	Intellectual Property	Liivak	3.0	A	
LAW 6861.601	Supervised Teaching	Hans/Rachlinski	3.0	SX	
LAW 7311.1	Immigration and Refugee Law	Yale-Loehr	3.0	A+	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	10.0	10.0	4.0000
Cumulative	44.0	44.0	44.0	44.0	26.0	26.0	3.9365

^ Dean's List

Spring 2021 (2/8/2021 - 5/7/2021)

LAW 6264.1	Criminal Procedure - Investigations	Colb	3.0	A-	
LAW 6401.1	Evidence	Weyble	3.0	A	
LAW 6861.604	Supervised Teaching	Chutkow	2.0	SX	
LAW 7072.101	Animal Rights	Colb	3.0	S	
LAW 7801.301	Asylum and Convention Against Torture Appellate Clinic	McKee/Yale-Loehr	4.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	10.0	10.0	3.9010
Cumulative	59.0	59.0	59.0	59.0	36.0	36.0	3.9266

^ Dean's List

Fall 2021 (8/24/2021 - 12/3/2021)

LAW 6641.1	Professional Responsibility	Wendel	3.0	A
LAW 6861.606	Supervised Teaching	Chutkow	2.0	SX
LAW 7739.101	The Role of the State Attorney General	Callery/McArdle	3.0	A
LAW 7810.301	Advanced Asylum and Convention Against Torture Appellate Clinic	McKee/Kelley-Widmer	3.0	A
LAW 7833.301	Criminal Defense Trial Practicum - Local Court	Salisbury	4.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	0.0	0.0	13.0	13.0	4.0000
Cumulative	74.0	74.0	59.0	59.0	49.0	49.0	3.9461

^ Dean's List

Total Hours Earned: 74

SFU

Unofficial Transcript

Student Name: Manly, Jordyn Rebecca
ID Number: 301273587
Birthdate: Oct 23

Date of Issue: January 23 2022

Credentials Awarded

Credential Awarded: Certificate in Police Studies
Faculty: Faculty of Arts and Social Sciences
Credential Awarded Date: May 21, 2019
Credential Confer Date: Jun 11, 2019

Credential Awarded: Bachelor of Arts (with Distinction)
Major in Criminology
Faculty: Faculty of Arts and Social Sciences
Credential GPA: 3.83
Credential Awarded Date: May 21, 2019
Credential Confer Date: Jun 11, 2019

Beginning of Undergraduate Record

2015 Fall
Bachelor of Arts

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
CRIM 101	Introduction to Criminology		3.00	3.00	A-	11.01	B-	296
CRIM 131	Int Crim Justice Sys		3.00	3.00	B+	9.99	C+	218
PSYC 100	Intro.Psychology I		3.00	3.00	A-	11.01	B-	406
SA 150	Intro to Sociology		4.00	4.00	A-	14.68	B-	292
Term Totals:			13.00	13.00		46.69		
Cumulative Totals:			13.00	13.00		46.69		

Term GPA: **3.59** Cumulative GPA: **3.59**
Academic Standing: Good Academic Standing

2016 Spring
Bachelor of Arts

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
CRIM 103	Psychological Expln. Behavior		3.00	3.00	A+	12.99	B-	141
CRIM 135	Int Cdn Law/Legal In		3.00	3.00	B+	9.99	B	142
EASC 104	Geohazards-Earth in Turmoil		3.00	3.00	B	9.00	B-	70
PSYC 102	Intro.Psychology II		3.00	3.00	B	9.00	C+	405
Term Totals:			12.00	12.00		40.98		
Cumulative Totals:			25.00	25.00		87.67		

Term GPA: **3.42** Cumulative GPA: **3.51**
Academic Standing: Good Academic Standing

SFU

Student Name: Manly, Jordyn Rebecca
ID Number: 301273587
Birthdate: Oct 23

Date of Issue: January 23 2022

2016 Summer
Bachelor of Arts

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
POL 151	Admin. of Justice		3.00	3.00	B	9.00	B-	44
Term Totals:			3.00	3.00		9.00		
Cumulative Totals:			28.00	28.00		96.67		

Term GPA: **3.00** Cumulative GPA: **3.45**
Academic Standing: Good Academic Standing

2016 Fall
Bachelor of Arts

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
BPK 140	Contemporary Health		3.00	3.00	A+	12.99	B+	214
CRIM 104	Sociological Expln. Behavior		3.00	3.00	A	12.00	B-	180
CRIM 230	Criminal Law		3.00	3.00	A	12.00	B-	132
IAT 110	Visual Communication Design		3.00	3.00	A-	11.01	B	175
PHIL 100W	Knowledge and Reality		3.00	3.00	A-	11.01	B-	290
Term Totals:			15.00	15.00		59.01		
Cumulative Totals:			43.00	43.00		155.68		

Term GPA: **3.93** Cumulative GPA: **3.62**
Academic Standing: Good Academic Standing
Term Honour: Dean's Honour Roll

2017 Spring
Bachelor of Arts

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
CRIM 205	Crime Myths		3.00	3.00	A	12.00	C+	51
CRIM 220	Research Methods		3.00	3.00	A-	11.01	B-	101
CRIM 251	Intro to Policing		3.00	3.00	A	12.00	C+	73
HSCI 120	Human Sexuality and Behaviour		3.00	3.00	A-	11.01	B-	163
STAT 203	Statistics for Social Sciences		3.00	3.00	A+	12.99	B-	220
Term Totals:			15.00	15.00		59.01		
Cumulative Totals:			58.00	58.00		214.69		

Term GPA: **3.93** Cumulative GPA: **3.70**
Academic Standing: Good Academic Standing
Term Honour: Dean's Honour Roll

SFU

Student Name: Manly, Jordyn Rebecca
ID Number: 301273587
Birthdate: Oct 23

Date of Issue: January 23 2022

2017 Summer
Major in Criminology, Bachelor of Arts

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
CRIM 355	The Forensic Sciences		3.00	3.00	A-	11.01	C	52
Term Totals:			3.00	3.00		11.01		
Cumulative Totals:			61.00	61.00		225.70		

Term GPA: **3.67** Cumulative GPA: **3.70**
Academic Standing: Good Academic Standing

2017 Fall
Major in Criminology, Bachelor of Arts

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
CA 120	Contemporary and Popular dance Course Topic: ST-Bhangra		3.00	3.00	A	12.00	A-	45
CRIM 330	Criminal Procedure/Evidence		3.00	3.00	A-	11.01	B	186
CRIM 356	The Forensic Sciences II		3.00	3.00	A	12.00	B+	105
CRIM 402	Biological Explanations Crime		3.00	3.00	A	12.00	B-	49
CRIM 431	Criminal Justice Systems		3.00	3.00	A-	11.01	B	22
Term Totals:			15.00	15.00		58.02		
Cumulative Totals:			76.00	76.00		283.72		

Term GPA: **3.87** Cumulative GPA: **3.73**
Academic Standing: Good Academic Standing
Term Honour: Dean's Honour Roll

2018 Spring
Major in Criminology, Bachelor of Arts

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
CRIM 300W	Theories/Perspectives in Crim		3.00	3.00	A	12.00	B-	120
CRIM 414	Special Topics in Criminology Course Topic: ST-Chronic & Violent Offenders		3.00	3.00	A	12.00	B+	25
CRIM 454	Criminal Profiling		3.00	3.00	A+	12.99	B	25
CRIM 456	Psychology in Policing		3.00	3.00	A+	12.99	B	25
EDUC 100W	Selected Questions and Issues		3.00	3.00	A+	12.99	A	45
Term Totals:			15.00	15.00		62.97		
Cumulative Totals:			91.00	91.00		346.69		

Term GPA: **4.20** Cumulative GPA: **3.81**
Academic Standing: Good Academic Standing
Term Honour: President's & Dean's Honour Roll

SFU

Student Name: Manly, Jordyn Rebecca
ID Number: 301273587
Birthdate: Oct 23

Date of Issue: January 23 2022

2018 Fall
Major in Criminology, Bachelor of Arts
Certificate in Police Studies

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
CRIM 316	Sexual Offenders Sex Offences		3.00	3.00	A+	12.99	B-	125
CRIM 319	Special Topics in Criminology Course Topic: ST-The Advocacy of Homicide		3.00	3.00	A-	11.01	B	23
CRIM 321	Qualitative Research Methods		3.00	3.00	A	12.00	B+	54
CRIM 343	Correctional Practice		3.00	3.00	A	12.00	B+	23
PSYC 268	Intro. to Law and Psychology		3.00	3.00	A+	12.99	B	46
Term Totals:			15.00	15.00		60.99		
Cumulative Totals:			106.00	106.00		407.68		

Term GPA: **4.07** Cumulative GPA: **3.85**
Academic Standing: Good Academic Standing
Term Honour: President's & Dean's Honour Roll

2019 Spring
Major in Criminology, Bachelor of Arts
Certificate in Police Studies

Course	Description	Repeated	Units Attempted	Units Completed	Grade	Grade Points	Class Average	Class Enrollment
CRIM 241	Intro to Corrections		3.00	3.00	A	12.00	B-	39
CRIM 320	Quantitative Research Methods		3.00	3.00	A-	11.01	B-	51
CRIM 357	Forensic Anatomy		3.00	3.00	B+	9.99	B+	24
CRIM 438	Wrongful Convictions		3.00	3.00	B+	9.99	B	25
EDUC 199	Foundations of Personal Agency		4.00	4.00	A	16.00	A-	47
Term Totals:			16.00	16.00		58.99		
Cumulative Totals:			122.00	122.00		466.67		

Term GPA: **3.69** Cumulative GPA: **3.83**
Academic Standing: Good Academic Standing
Term Honour: Dean's Honour Roll

End of Undergraduate Record

Scholarships, Medals and Prizes

Undergraduate

2017 Summer
Undergraduate Open Scholarship

2017 Fall
Undergraduate Open Scholarship

2018 Spring
Undergraduate Open Scholarship

SFU

Student Name: Manly, Jordyn Rebecca
ID Number: 301273587
Birthdate: Oct 23

Date of Issue: January 23 2022

2018 Fall
Undergraduate Open Scholarship

2019 Spring
Undergraduate Open Scholarship

- - - End of Transcript - - -

March 11, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am pleased to offer my strongest endorsement of Jordyn Manly who has applied for a judicial clerkship with you. Jordyn is an outstanding student at Cornell Law School. She has excelled in all ways during her time here. Based on her accomplishments and my own direct experience with her, I am confident that she will be an excellent clerk and I encourage you to consider her application most carefully.

I met Jordyn last year when she enrolled in my Social Science and Law course as a 1L student in the spring of 2020. During their first year, 1L students choose one elective in addition to taking the standard first year courses. The Social Science and Law course takes a critical approach to analyzing the potential contributions (and, I should add, also the perils) of lawyers' use of social science research in litigation. The semester was demanding in so many ways, as the health crisis from COVID-19 required us to move to online instruction halfway through the semester. Jordyn stood out as an active and engaged participant both before and after the change, contributing thoughtful commentary and moving the discussion forward. Despite the many challenges that she and other 1L students faced that semester, Jordyn took them in stride, mastering the material and performing at a top level. Like many law schools, Cornell Law School shifted to all pass-fail grading that semester. Knowing that they were not being graded, other students might have worked less diligently. Not Jordyn. Her exam performance and overall course contributions were the best in the class, and she received the CALI award for that course.

Her excellence in my course is in keeping with her overall performance in law school. In addition to excelling in her classes, she also serves as a General Editor of the Cornell Law Review. I was delighted to see that her Note, "Policing the Police Under 42 U.S.C. § 1983: Rethinking Monell to Impose Municipal Liability on the Basis of Respondeat Superior," was recently accepted for publication in a forthcoming Cornell Law Review issue. She also served superbly as a teaching assistant for a popular Psychology and Law course that Professor Jeffrey Rachlinski and I co-teach to Cornell undergraduates. The course was particularly challenging for teaching assistants as it included 160 students, all of whom participated remotely in accordance with Cornell's COVID-19 protocol for large classes. Both Professor Rachlinski and I were extremely grateful to Jordyn for all she contributed to make the course a good educational experience for our students, despite the trying circumstances.

In addition to all she has learned at Cornell Law School, Jordyn has developed a broad range of legally relevant experience. She worked as a summer law student for four summers, from 2015 to 2018, at a top Toronto criminal defense firm, Greenspan Partners LLP. Then, Jordyn interned during the 2019 summer for the Ministry of the Attorney General in Toronto and worked with prosecutors. She told me that it was extremely beneficial to see the work of the criminal courts through both the prosecution and defense perspectives. Last summer, she worked as a judicial intern for Judge Ann Donnelly in the U.S. District Court of the Eastern District of New York, continuing to expand and enrich her perspective on the litigation process.

These diverse experiences and her coursework have reaffirmed for Jordyn her keen interest in litigation practice. A judicial clerkship with you would augment and enrich her understanding of judicial perspectives on litigation. She also recognizes how the clerkship experience will help her perfect her already strong legal analysis and writing ability. In turn, her superb legal research and writing skills and collaborative approach will contribute positively to the work of your chambers.

I recommend Jordyn Manly to you without reservation. Should you wish to discuss any aspect of her application, please do not hesitate to contact me.

Sincerely,

Valerie P. Hans, Ph.D.
Charles F. Rechlin Professor of Law

Valerie Hans - vh42@cornell.edu - 607-255-0095

March 11, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

Please accept this letter as my recommendation for Jordyn Manly, who is applying for a clerkship in your chambers. Jordyn is a superb writer with an outstanding ability to research and concisely analyze complex legal issues. She will make an excellent clerk.

I am very familiar with Jordyn's abilities because I have taught her for three semesters: two semesters in Lawyering, a course that introduces first-year law students to legal research, writing, and analysis; and one semester in the Asylum & Convention Against Torture Appellate Clinic, which accepts only eight second- and third-year law students. At the end of her first semester in law school, Jordyn earned an A- in Lawyering. Because I had to curve such a small group of students (only 35 that semester), an A- grade encompassed a wide range of abilities, and Jordyn was at the top of that range. In the second semester, Jordyn produced the best persuasive memo in class. My personal notes on that memo said, "Killed it. Very clear law . . . very well-organized. Everything on point with theory. Strong use of case-based argument and facts." Her rewrite of that memo was even stronger, which demonstrated to me that she cared about the work and was willing to put her best effort into the assignment. This was particularly notable since the course had become pass-fail during the middle of the semester because of COVID-19. Further, the assignment itself was substantively difficult, addressing asylum, a complex area in immigration law. Jordyn had to extract the facts from a hearing transcript, witness declaration, and multiple country-conditions reports, and argue that her client was eligible for asylum on the ground of his imputed political opinion. She accomplished these tasks with aplomb.

In the Asylum Clinic, Jordyn and her teammate produced an excellent brief—one of the best I have seen in the clinic, which I have co-directed for eleven years. This brief addressed legal and factual errors made by the Board of Immigration Appeals and the immigration judge, who denied our client's asylum and Convention Against Torture claims. Jordyn chose to argue our client's Convention Against Torture claim since she had already written on an asylum claim in Lawyering, further demonstrating her willingness to take on challenges. She did such an excellent job that our co-counsel, a managing attorney at Catholic Charities in New York City, repeatedly commented on it.

Finally, Jordyn has a cheerful demeanor, is highly professional, and is a pleasure to work with. Her communication style is direct but always courteous. For example, I made a mistake when critiquing one of her papers in Lawyering, a mistake she caught when I returned the paper to her. I was so impressed with the way she politely called it to my attention that, afterwards, I offered to write her a recommendation should she ever need one. And I am happy that she has called on me for this task!

I have no doubt that Jordyn will be an excellent clerk and attorney, regardless of where her career takes her. Please feel free to call me on my cell (607.280.7665) should you need any further information.

Sincerely,

Estelle M. McKee
Clinical Professor of Law (Lawyering)

March 11, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Letter of Recommendation for Jordyn Manly

Dear Judge Liman:

This is a letter of recommendation on behalf of Jordyn Manly. I first got to know Jordyn last fall, when she was a 2L in my immigration and refugee law class. Jordyn was well-prepared for every class and gave insightful comments throughout the semester. Jordyn completed a number of written assignments for the class, participated in a mock congressional hearing, and completed a final exam that included having to analyze a potential Supreme Court immigration case. I gave her an A+ in the class, which she easily deserved and which was especially good considering she was only a 2L at the time and there were several 3Ls in the class. Jordyn received the CALI award for having the highest grade and being the best student in the class.

I also know Jordyn from her work in the Asylum and Convention Against Torture Appellate Clinic this spring, which I co-direct with Estelle McKee. Although I didn't directly supervise Jordyn in our asylum clinic, I reviewed a draft of a brief she and her teammate wrote in their Second Circuit appeal on behalf of an asylum applicant from El Salvador. The draft brief was one of the best drafts I have seen in the 15+ years I have run the asylum clinic. I had very few comments to improve the draft, either substantively or stylistically.

As a former law clerk to a federal judge myself, I know the importance of hiring someone with an excellent combination of legal research skills, writing ability, intellectual firepower, and the ability to work well with others. Jordyn combines all four characteristics incredibly well. Moreover, she is nice, mature, and easy to work with. She always completed her work on time, even though she had many other commitments, including law review, moot court, and other classes.

For all these reasons, I enthusiastically recommend Jordyn for a clerkship with you.

If you have any questions, please call me at (607) 379-9707.

Sincerely,

Stephen Yale-Loehr
Professor of Immigration Law Practice

Jordyn Manly

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WRITING SAMPLE

Attached please find an excerpt from a Note I independently wrote as an Associate on the *Cornell Law Review*. This Note, entitled *Policing the Police Under 42 U.S.C. § 1983: Rethinking Monell to Impose Municipal Liability on the Basis of Respondeat Superior*, was selected for publication in Volume 107 of the *Cornell Law Review* and is expected to be published this March. In the interest of brevity, I have omitted the introduction and background sections.

ANALYSIS

Imposing Municipal Liability on the Basis of Respondeat Superior

In response to public outcry in the wake of George Floyd's death, Congress has introduced legislation designed to eliminate, or at least reform, qualified immunity protection for police officers.[93] Eliminating or reforming qualified immunity is a good first step to tackling the issue of police misconduct. But such a solution, which focuses on holding individual "bad apple" cops accountable, does nothing to address the broader systemic issue of police organizational culture that is so often the root cause of police misconduct. Imposing municipal liability based on *respondeat superior* can close this gap by incentivizing municipalities to directly confront organizational cultures that encourage and allow police misconduct to flourish. Indeed, an informal poll of several experts in 2015 found that the most common response when asked what one change would be most helpful to "fix" the law under Section 1983 was the adoption of *respondeat superior* liability for municipal defendants.[94]

The doctrine of *respondeat superior*, Latin for "let the master answer," holds a principal vicariously liable for the wrongdoings of its agent committed within the scope of their agency relationship, whether or not the principal is itself at fault.[95] Holding both the agent and principal responsible for the agent's wrongdoings "ensures victims are fully compensated, incentivizes agents or employees to discharge their duties with care, and incentivizes principals or employers to promote safe business practices."[96] Rooted in common law tort theory, the *respondeat*

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[93] *See* NOVAK, *supra* note 67.
[94] *See* Dawson, *supra* note 40, at 504.
[95] *See "Respondeat Superior*," https://legal-dictionary.thefreedictionary.com/respondeat+superior.
[96] De Nevers, *supra* note 63.

superior doctrine stems from the notion that a principal has the ability to exercise control over its agent's behavior and should therefore shoulder some responsibility for its agent's conduct.[97] To date, imposing tort liability through *respondeat superior* has been effectively used to impact corporate behavior in a wide variety of areas. In response to potential tort liability—and the looming threat of punitive damages—companies are incentivized to put an end to potentially wrongful practices or behaviors by individuals under their control.[98] Proponents of imposing municipal liability for police misconduct on the basis of *respondeat superior* argue that like all other employers, municipalities should be held responsible for the conduct of officers in the course and scope of their employment: "Just as private employers are responsible for the torts of their employees who violate federal rights in the court of employment, municipalities [should be] responsible in the same manner."[99] *Respondeat superior*, unlike current efforts to address police misconduct, would address informal incentives and sanctions perpetuated by the organizational hierarchy and leadership, "which in turn shape the street-level officers' use of discretion in every-day work."[100]

Critics of imposing municipal liability based on a *respondeat superior* theory may argue that since municipalities already indemnify individual officers who are ordered to pay damages to plaintiffs in Section 1983 civil suits, adopting such a doctrine would provide no added financial incentive for municipalities to change their practices. But while it is true that municipalities often indemnify police officers under the current Section 1983 regime, the qualified immunity doctrine invoked by individual officers most often lets the municipality off

[97] *See "Respondeat Superior*," https://legal-dictionary.thefreedictionary.com/respondeat+superior.
[98] *See* Schreiber, *supra* note 72.
[99] Hawke, *supra* note 42, at 844.
[100] Anechiarico & Lockwood, *supra* note 36, at 336.

scot free.[101] If victims of police misconduct could directly sue the municipality instead of the individual officer, plaintiffs would not be barred by the individual qualified immunity defense—of which there is no equivalent available for municipalities—and municipalities would be at risk for more direct and significant financial consequences.[102] Concerns of financial liability will encourage municipalities to raise hiring standards, improve officer training, and discipline officers for their wrongful actions. Indeed, scholars have noted that "[o]fficers will violate the law if they are insufficiently trained or equipped to follow it, a condition that is determined largely by departments and municipalities rather than officers themselves."[103] For individual officers to change, department-wide policies must be implemented to address the organizational culture of police agencies, which will in turn require top-down pressure and strong leadership by those at the highest level.[104]

Imposing municipal liability through the doctrine of *respondeat superior* will incentivize municipalities to improve officer training and to better regulate officers' use of force and interactions within the community, by creating "legal and political linkage between patrol service on the street and public officials who have the power to influence the quality of that service."[105] Similarly, municipalities will be encouraged to invest in accountability mechanisms, such as the creation of written administrative directives regarding high-risk patrol practices which would inform officers of admissible parameters surrounding use of force and of the potential sanctions that may be used to address instances of officer misconduct.[106] The prospect

[101] *See* De Nevers, *supra* note 63.
[102] *See id.*
[103] Harmon, *supra* note 81.
[104] *See* Armacost, *supra* note 15, at 521.
[105] Anechiarico & Lockwood, *supra* note 36, at 346; *see* Dawson, *supra* note 40, at 503.
[106] *See* Anechiarico & Lockwood, *supra* note 36, at 345.

of financial consequences may further motivate municipalities and police departments to enact a comprehensive system of receiving and investigating citizen complaints, which should also be included in officer's files.[107] Today, many jurisdictions have ineffective—and in some cases, nonexistent—systems for tracking such complaints, and little incentive to improve these systems.[108] Officer files, in turn, should be considered by the department when making promotional decisions, which can be enforced through municipal legislation.[109] Moreover, departments would be pressured to regularly engage in systematic reviews of its officers. Officers with citizen complaints or lawsuits against them—whether or not the lawsuits were successful—should be required to participate in counselling, as well as mandatory racial and cultural awareness training.[110]

Critics of adopting the *respondeat superior* doctrine for municipalities may also contend that if the *Monell* "policy and custom" doctrine is abolished, plaintiffs will be unable to challenge more widespread issues of abuse by municipal defendants. Such critics argue, for instance, that imposing municipal liability based on a *respondeat superior* theory would prevent plaintiffs from being able to gather the necessary evidence to prove, and in turn enjoin, pervasive patterns and practices of abuse.[111] As Professor Edward Dawson points out, however, this would not be the case; adopting the *respondeat superior* doctrine would simply mean that plaintiffs would not be *required* to engage in extensive discovery of municipal policies, practices, or customs.[112] Class actions would still be available for plaintiffs who seek to challenge

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[107] *See id.*
[108] *See* Armacost, *supra* note 15, at 537.
[109] *See* Patton, *supra* note 82, at 805.
[110] *See id*. at 806.
[111] *See* Dawson, *supra* note 40, at 515.
[112] *Id.*

widespread municipal customs or policies which violate constitutional rights.[113] Accordingly, a re*spondeat superior* solution will not create any new barriers to challenging such customs or policies in federal courts.

Adopting Respondeat Superior *for Municipal Defendants: Procedural Barriers to Implementation*

Practically speaking, imposing municipal liability on the basis of *respondeat superior* would require overruling the Court's holding in *Monell*. One way of accomplishing this is through the courts. Although the Supreme Court seems to continue to favor its prior ruling in *Monell*, at least three Supreme Court justices have expressed a desire to overrule it.[114] Justice Stevens, for instance, has asserted that the text of Section 1983, policy, legislative history, and common law all support imposing the *respondeat superior* doctrine on municipalities.[115] In the 1997 case of *Board of County Commissioners v. Brown*, Justice Breyer agreed with and added to Justice Stevens' critiques in a dissent joined by three other Justices, calling for a re-examination of the *Monell* doctrine.[116] Justice Breyer argued that in addition to the *Monell* doctrine's questionable origins, it had become unnecessarily complicated and too confusing to apply in practice.[117]

Although some scholars in the late 1990s and early 2000s believed that the Court's reversal of *Monell* was plausible following the dissent in *Brown*, this hope has yet to be realized.[118] Nevertheless, scholars believe that such a change is in fact feasible, for two primary

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[113] *Id.*
[114] Hawke, *supra* note 42, at 850.
[115] *See* Dawson, *supra* note 40, at 503.
[116] *See id.*
[117] *See id.;* Hawke, *supra* note 42, at 846.
[118] Dawson, *supra* note 40, at 504.

reasons.[119] Firstly, scholars point out that in interpreting Section 1983—and in contrast to more typical statutory interpretation—the Supreme Court has proven willing to change and reverse its own doctrine even in the absence of any Congressional amendment.[120] The Court's basis for doing so largely lies in policy considerations; the Court has, in the past, been open to changing its prior doctrinal interpretation when it believes that Section 1983 can be significantly improved.[121] Second, such a change in Section 1983 doctrine may be feasible because the Court has shown an "equivocal attitude" towards issues surrounding municipal liability.[122] This ambivalent attitude is especially promising in light of the Court's consistently enthusiastic position when it comes to the doctrine of qualified immunity. Whereas the Court has continued to encourage and strengthen the qualified immunity defense over time—often in unanimous or 7-2 decisions—the same cannot be said for municipal liability cases.[123] When it comes to *Monell* liability, the Court has proven itself to be much more apathetic. Many of the early cases establishing the "policy and custom" doctrine were plurality, as opposed to majority, opinions, and later holdings in this area were often based on 5-4 decisions.[124] And, as mentioned above, several Justices have shown a willingness to overturn *Monell*.

Although scholars believe that the Court's Section 1983 interpretation is largely driven by policy concerns, imposing municipal liability based on a *respondeat superior* theory can also

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[119] *See id.* at 534.
[120] *Id*. For instance, the Court in *Monell* reversed its holding in *Monroe* in order to allow for municipal liability under Section 1983. *Id.*
[121] *See id.* at 536. Why the Court has favored an approach "more similar to federal common law making than to conventional statutory interpretation" when it comes to Section 1983 is an interesting question—perhaps the answer is because in the unique case of Section 1983, the statutory text, legislative history, and common law do not provide sufficient guidance. *Id.*
[122] *Id.*
[123] *See id.* at 537.
[124] *See id.*

be justified by looking to the more conventional sources of statutory interpretation—text, legislative history, and common law.[125] First, the statutory text allows for the adoption of *respondeat superior* for municipalities.[126] In *Monell*, the Court took a broader reading of the statutory term "person[s]" than it did in *Monroe*, finding that "person[s]" *did* include municipalities.[127] However, the Court also found that the statutory term "causes to be subjected" indicated that something more than *respondeat superior* liability was needed; rather, proof of "direct responsibility or causation on the part of the municipal defendant" was required.[128] Despite this holding, several Justices have since agreed that the statutory language of "causes to be subjected" *can* be read to impose *respondeat superior* on municipal defendants.[129] Under this view, "the municipal defendant 'causes' the plaintiff 'to be subjected' to injury by employing the officer who, acting under color of law, violates the plaintiff's rights."[130] Moreover, the statutory text of Section 1983 includes no mention of the word "policy," which appears to be the basis for the *Monell* Court's "policy or custom" requirement. Accordingly, eliminating the unnecessarily complex "policy or custom" requirement would bring Section 1983 more in line with the statutory text.[131] Thus, the statutory text of Section 1983 not only allows for municipal liability on the basis of *respondeat superior*, but is in fact the better reading of the Congressional language.[132]

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[125] *See id.* at 527.
[126] *See id.* at 529.
[127] *See Monell*, 436 U.S. at 691.
[128] Dawson, *supra* note 40, at 529.
[129] *See id.*
[130] *Id.*
[131] *See id.*
[132] *See id.*

The legislative history of Section 1983, moreover, does not pose a barrier to adopting *respondeat superior* liability for municipal defendants. Although there have been lengthy debates about the legislative history, what has become apparent is that the statute is unclear, as evidenced by a wide variety of different statutory interpretations; whereas some Justices have interpreted Section 1983 to prohibit any form of municipal liability, others have found that municipal liability is permissible if caused by a municipal "policy or custom," and still others have read the statute to call for *respondeat superior* liability.[133] While this Note will not recount the debates surrounding Section 1983's legislative history, it appears that the legislative history of the statute does support *respondeat superior* liability for municipalities.

Finally, imposing municipal liability based on a theory of *respondeat superior* is supported by common law. Although the Court is not bound by common law when engaging in statutory interpretation, the Court has, in interpreting various aspects of Section 1983, frequently relied on the common law of torts.[134] To be sure, the Court has rationalized that Congress, in drafting Section 1983, would have "been mindful of and intended to adopt the common law rules of tort law as they existed at that time."[135] There is extensive evidence that the doctrine of *respondeat superior* liability not only existed in 1871, but also extended to municipalities at that time.[136] Ultimately, the conventional sources of statutory interpretation—text, legislative history, and common law—appear to support imposing municipal liability based on a theory of *respondeat superior*.

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[133] *See id.* at 531.
[134] *See id.* at 532.
[135] *Id.*; *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012) (explaining how the Court analyzes common law analogs in determining the scope of immunity under Section 1983).
[136] Dawson, *supra* note 40, at 533.

Still, there exists an alternative solution: Congress can pass legislation allowing for municipal liability based on *respondeat superior*. It is a popular misconception that the Supreme Court has the final say on the scope and meaning of federal law.[137] When the Court rules on a constitutional issue, this is essentially true; such decisions can be altered only by constitutional amendment or by a new decision of the Court.[138] But occasionally, when Congress enacts a statute that is later misinterpreted by the Supreme Court, Congress will amend or re-enact the legislation in order to clarify its original intent.[139] Although Congressional overrides have been on the decline over the past couple of decades, they do still occur from time to time.[140] It is true that a Congressional override is not an easy undertaking—in order to override a Supreme Court decision, both houses of Congress must agree.[141] But it is possible. Here, since the Supreme Court's decision in *Monell* was based on statutory interpretation—and not on the Constitution itself—Congress has the ability to override this policy.[142] Only a minor legislative tweak would be necessary; Congress need only pass a short decision "to reinforce congressional intent in a way that the judiciary cannot distort it."[143]

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[137] Leon Friedman, *Overruling the Court*, AMER. PROSPECT (Dec. 19, 2001), https://prospect.org/features/overruling-court/.
[138] SUPREME COURT, THE COURT AND CONSTITUTIONAL INTERPRETATION, https://www.supremecourt.gov/about/constitutional.aspx.
[139] *See* Friedman, *supra* note 137.
[140] *See* Rachel M. Cohen & Marcia Brown, *Congress Has the Power to Override Supreme Court Rulings. Here's How.*, INTERCEPT (Nov. 24, 2020), https://theintercept.com/2020/11/24/congress-override-supreme-court/.
[141] Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INTL. R. L. ECONOMICS 503, 506 (1996).
[142] De Nevers, *supra* note 63.
[143] Cohen & Brown, *supra* note 140.

Limitations of Municipal Liability Based on* Respondeat Superior *as a Solution to Reducing Police Misconduct

Of course, imposing municipal liability based on *respondeat superior* is not without its limitations. First, several police departments across the United States are not controlled by their respective municipalities.[144] In Baltimore, for instance, the city itself is not the principal of police officers.[145] In these locations, then, a *respondeat superior* theory will likely do little to address increasing rates of police misconduct. Another concern raised by the imposition of municipal liability on a *respondeat superior* basis is that without *Monell*'s difficult-to-meet "policy or custom" requirement, many more plaintiffs would likely bring civil lawsuits against municipalities, leading to greater litigation costs for municipalities.[146] Nevertheless, it can be argued that it only makes sense to shift litigation costs from plaintiffs—who typically have limited financial resources—to municipalities with deep pockets, which would make it easier for plaintiffs to seek legal redress in courts. Victims of police misconduct and brutality will not only find it easier and less costly to pursue litigation but may also be awarded more generous damages upon recovery, which would further the statutory goal of victim compensation.[147]

Additionally, imposing municipal liability on the basis of *respondeat superior* will encourage judicial efficiency in the courts by helping to simplify Section 1983 litigation. To ensure that the municipality is not dismissed from a given case, a plaintiff will need only to show that the individual officer was acting within the scope of employment with the municipal

[144] Hawke, *supra* note 42, at 848.
[145] *Id.*
[146] *See id.* at 850.
[147] *See* Dawson, *supra* note 40, at 510, 519.

defendant when they engaged in allegedly unconstitutional conduct.[148] This standard is much simpler and easier to apply than the multifaceted test that courts must engage in under the current *Monell* doctrine.[149] Adopting a *respondeat superior* theory would thereby help "[eliminate] the complex and costly inquiries into municipal policy, custom, government structure, training, and hiring that are required under the current doctrine in order for a plaintiff to impose liability on a city in a lawsuit under [Section] 1983."[150] And, in addition to reducing backlog in federal courts, the need for less extensive discovery will save significant time and financial resources for attorneys on both sides.

Moreover, imposing municipal liability on the basis of *respondeat superior* would better serve the statutory value of federalism.[151] Federalism concerns have played a significant role in the Court's development of Section 1983 liability, as exemplified by the Court's repeated assertions that in interpreting Section 1983, it must be cautious to "avoid imposing liability in ways that unduly interferes with the powers and abilities of state and local governments to structure their own operations."[152] In reality, however, the *Monell* doctrine effectively requires scrutinizing local policies and those who implement such policies, which is highly intrusive into the interests of states and localities.[153] To satisfy *Monell*'s "policy or custom" requirement, courts may, for example, be required to look to state law in order to determine if certain officials are "policymakers" in the context of a specific government function as well as in examining whether or not a practice is sufficient to amount to a "custom."[154] Eliminating *Monell*'s "policy

[148] *See id.* at 520.
[149] *See* Hawke, *supra* note 42, at 847.
[150] Dawson, *supra* note 40, at 511.
[151] *Id.* at 510.
[152] *Id.* at 523.
[153] *See id.* at 524.
[154] *See id.* at 497.

or custom" requirement would allow federal courts to focus on federal constitutional law within their area of expertise, as opposed to questions of state and local government law.[155] Federal courts would no longer have to inquire into and decide upon questions surrounding municipal policies, customs, and training, which widely vary depending on the state or municipality.[156]

But while there are clear benefits to imposing municipal liability for police misconduct based on the tort doctrine of *respondeat superior*, one issue that this solution fails to directly address is the structural racism within the institution of policing that is inherently intertwined with police misconduct. Considered in light of the policing institution's history, this is not surprising; police departments originated from slave patrols in the 18th century, and though much has changed since the 18th century, police continue to be tied up in racial strife.[157] Whether racial bias exists in higher levels within the police force as opposed to the general population remains unanswered. One study, for instance, found that police officers tend to harbor higher rates of prejudice than do civilians, but the effect size in this study was plagued by regional and demographic effects.[158] But while structural racism within policing is an important question—one that is beyond the scope of this Note—the evidence is clear that racial minorities are disproportionately subjected to excessive use of force by police officers.[159] African Americans, in particular, are disproportionately victims of police misconduct, relative to both their overall

[155] *See id.* at 508.
[156] *See id.* at 510.
[157] *See id.*
[158] *Id.*
[159] AMERICAN MEDICAL ASSOCIATION, *Press Release: AMA Policy Recognizes Police Brutality as Product of Structural Racism* (Nov. 17, 2020), https://www.ama-assn.org/press-center/press-releases/ama-policy-recognizes-police-brutality-product-structural-racism.

share of the total population as well as the percentage of crimes they commit.[160] One study has estimated that Black men are 2.5 times more likely to be killed by police during their lifetime as opposed to white men.[161] So while imposing *respondeat superior* on municipal defendants will lead to increased accountability for police departments and municipalities and will in turn help to reduce the overall number of instances of police misconduct, this solution will not effectively address the underlying structural racism within police agencies that results in disproportionate use of force against racial minorities. In addition to reactive legal remedies such as the one proposed in this Note, proactive solutions must also be implemented to address racism in the police force in the first instance. Imposing municipal liability based on *respondeat superior* is an important first step to re-establishing trust between police agencies and the communities which they serve. But in the fight to eliminate police misconduct, structural racism is a factor that cannot be ignored.

CONCLUSION

Current legal remedies available to victims of police misconduct are inadequate, as they often undervalue or altogether ignore broader organizational factors.[162] Indeed, the vast majority of police commissions and task forces assembled over the last few decades have found that repetitive incidents of misconduct were caused, at least in part, by systemic features of police culture.[163] As one former police officer has expressed, "[t]he bad apples rot the barrel … [a]nd until we do something about the rotten barrel, it doesn't matter how many good [] apples you put

[160] *See* Zack Beauchamp, *What the Police Really Believe,* VOX (July 7, 2020), https://www.vox.com/policy-and-politics/2020/7/7/21293259/police-racism-violence-ideology-george-floyd.
[161] Peeples, *supra* note 7.
[162] *See* Armacost, *supra* note 15, at 456.
[163] *See id.* at 457.

in it."[164] In order to deter future police misconduct, then, legal remedies must focus not just on the individual officers, but on the departments that employ and train them.[165] Municipalities and departments which permit and foster a dysfunctional organizational culture that teaches officers—whether explicitly or implicitly—that misconduct is acceptable *should* bear some legal responsibility. As the Court noted in *Monell*, Section 1983 was "intended to give a broad remedy for violations of federally protected rights."[166] Since the scope of claims available under Section 1983 has been narrowed by a succession of Supreme Court cases over the years, overruling *Monell* to impose the *respondeat superior* doctrine on municipalities would bring Section 1983 back in line with Congressional intent. Ultimately, rethinking *Monell* to impose municipal liability for police misconduct on the basis of *respondeat superior* will not only help reduce instances of police misconduct in the first place, but will result in a more equitable and just legal system for the community as a whole. "It's about time we hold our communities to the same standards as our trucking companies."[167]

[164] Beauchamp, *supra* note 160.
[165] Harmon, *supra* note 81.
[166] *Monell*, 436 U.S. at 685.
[167] De Nevers, *supra* note 63.

Applicant Details

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Applicant Education

BA/BS From	**New York University**
Date of BA/BS	**May 2016**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**April 29, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

March 9, 2022

Dear Judge Liman,

I am a legal fellow at the Brennan Center for Justice and a 2021 graduate of Columbia Law School. I write to apply for a clerkship in your chambers beginning in August 2024.

I plan to work as a litigator in the coming years and hope to eventually pursue a career in law teaching. Accordingly, I see immense value in gaining practical experience within our federal court system and seek to do so by serving as a clerk. During my time at Columbia, I developed my research and writing skills by participating in a variety of legal internships and a judicial externship, working as a research and teaching assistant, and providing legal writing tutoring to first-year law students. Moreover, I served as an Articles Editor on the *Columbia Law Review* and authored multiple law review pieces. Presently, I continue to build upon my lawyering capabilities as I work on a range of litigation and legislative projects in my legal fellowship. I would appreciate the opportunity to apply these skills in a clerkship position.

Enclosed please find a resume, law school transcript, undergraduate transcript, and writing sample. Following separately are letters of recommendation from Professors Richard Briffault (212 854-2638, rb34@columbia.edu), Mark Barenberg (212 854-2260, barenberg@law.columbia.edu), and Lori Damrosch (212 854-3740, damrosch@law.columbia.edu). Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Sincerely,

John Martin

JOHN MARTIN

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EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
Juris Doctor, received April 2021

Honors: Harlan Fiske Stone Scholar
Hamilton Fellow (full-tuition merit scholarship)
Parker School Recognition of Achievement (for achievement in international and comparative law)

Activities: *Columbia Law Review*, Articles Editor
Teaching Assistant to Professor Richard Briffault (Law of the Political Process, Fall 2020)
Research Assistant to Professors Sarah Cleveland & Amal Clooney (2020) (researched global media freedom)
CLS Writing Center, Fellow (tutored 1L and LLM students in legal writing)
ACLU Student Chapter, President

NEW YORK UNIVERSITY, New York, NY
B.A., *magna cum laude*, in International Relations received May 2016; Minor in Economic Policy

Honors: Presidential Honors Scholar

Activities: *Economics Review at NYU*, Cofounder
Resident Assistant (2015–2016)

Study Abroad: NYU Abu Dhabi, United Arab Emirates (Spring 2014)

EXPERIENCE

BRENNAN CENTER FOR JUSTICE, New York, NY — August 2021 – Present
Legal Fellow. Draft sections of briefs in multiple campaign finance cases, including an *amicus* brief filed in the ongoing U.S. Supreme Court case *FEC v. Cruz*. Regularly conduct research and write memoranda when needed on questions pertaining to the intersection of campaign finance and other areas of law. Evaluate and suggest changes to regulations being considered by the New York Public Campaign Finance Board. Draft federal legislative proposals to enhance the protection of state election officials.

CAMPAIGN LEGAL CENTER, Washington, DC — Spring 2021
Legal Intern. Conducted research and wrote memoranda on numerous campaign finance law questions. Contributed to research and formulation of legal arguments in federal litigation. Drafted testimony for legislative hearings in which CLC participated.

WINSTON & STRAWN LLP, New York, NY — Summer 2020
Summer Associate. Researched and summarized current no-poach antitrust jurisprudence to support litigation efforts. Wrote letters to the DOJ in a FOIA dispute. Led pro bono project to draft a document retention policy for a local nonprofit organization.

HON. ROBERT D. SACK, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, New York, NY — Spring 2020
Judicial Extern. Drafted bench memoranda to prepare Judge Sack for oral arguments. Proofread summary orders to ensure that they adhered to the Bluebook and properly reflected the case law.

KNIGHT FIRST AMENDMENT INSTITUTE, New York, NY — Summer 2019
Legal Intern. Wrote memoranda overviewing First and Fifth Amendment issues that the Institute encountered in its constitutional challenge against prepublication review. Drafted portions of a district court brief. Determined which FOIA exemptions were worth disputing in a lawsuit against the DOJ. Participated in meetings to discuss future litigation opportunities and strategy.

U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, Washington, DC — August 2016 – June 2018
Paralegal. Monitored prospective state and federal regulations that could result in anticompetitive harm to the U.S. economy, and worked with Division attorneys to communicate concerns to relevant legislators and departments. Analyzed documents received by parties within antitrust investigations to determine potential anticompetitive harm.

PUBLICATIONS

Danger Signs in State and Local Campaign Finance, 74 ALA. L. REV. (forthcoming 2022).

Mail-In Ballots and Constraints on Federal Power Under the Electors Clause, 107 VA. L. REV. ONLINE 84 (2021).

Note, *Hacks Dangerous to Human Life*, 121 COLUM. L. REV. 119 (2021).

Self-Funded Campaigns and the Current (Lack of?) Limits on Candidate Contributions to Political Parties, 120 COLUM. L. REV. F. 178 (2020).

INTERESTS: French (conversational), Arabic (basic), weightlifting, drumming, skiing, urban exploration, cheesecake

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/20/2021 18:20:43

Program: Juris Doctor

John J Martin

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6231-2	Corporations	McCrary, Justin	4.0	A
L6546-1	Global Constitutionalism	Doyle, Michael W.	3.0	A
L6229-1	Ideas of the First Amendment [Minor Writing Credit - Earned]	Abrams, Floyd; Blasi, Vincent	4.0	A-
L8516-1	S. Election Law for Civil Rights Lawyers	Perez, Myrna	2.0	B+
L6683-1	Supervised Research Paper	Briffault, Richard	2.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6476-1	Advanced Constitutional Law: Separation of Powers	Monaghan, Henry Paul	3.0	B+
L6293-1	Antitrust and Trade Regulation	McCrary, Justin	3.0	B+
L6670-1	Columbia Law Review		0.0	CR
L6160-1	Law in the Internet Society	Moglen, Eben	2.0	B+
L6169-1	Legislation and Regulation	Merrill, Thomas W.	4.0	B+
L6680-1	Moot Court Stone Honor Competition	Richman, Daniel; Strauss, Ilene	0.0	CR
L6274-2	Professional Responsibility	Fox, Michael Louis	2.0	A
L6822-1	Teaching Fellows	Ginsburg, Jane C.	1.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8518-1	Advanced Research Practicum in Global Media Freedom	Cleveland, Sarah; Sokoler, Jennifer B.; Yeginsu, Can	2.0	CR
L6670-1	Columbia Law Review		0.0	CR
L6241-1	Evidence	Capra, Daniel	4.0	CR
L6664-1	Ex. Federal Appellate Court	Parker, Barrington; Sack, Robert D.; Sokoler, Jennifer B.	1.0	CR
L6664-2	Ex. Federal Appellate Court - Fieldwork	Parker, Barrington; Sack, Robert D.; Sokoler, Jennifer B.	3.0	CR
L6473-1	Labor Law	Barenberg, Mark	4.0	CR
L9383-1	S. International Humanitarian Law	Rona, Gabor	2.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	B+
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6276-1	Human Rights	Cleveland, Sarah; Clooney, Amal	3.0	A-
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A
L6675-1	Major Writing Credit	Damrosch, Lori Fisler	0.0	CR
L6683-1	Supervised Research Paper	Damrosch, Lori Fisler	2.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Barenberg, Mark	4.0	B+
L6108-2	Criminal Law	Scott, Elizabeth	3.0	B
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6269-1	International Law	Damrosch, Lori Fisler	3.0	A
L6121-1	Legal Practice Workshop II	Smith, Trisha	1.0	HP
L6118-1	Torts	Liebman, Benjamin L.	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-1	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	A-
L6105-6	Contracts	Mitts, Joshua	4.0	B+
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-1	Legal Practice Workshop I	Smith, Trisha; Whaley, Hunter	2.0	HP
L6116-1	Property	Merrill, Thomas W.	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 92.0

Total Earned JD Program Points: 92.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	Parker School Recognition of Achievement	3L
2020-21	Harlan Fiske Stone	3L
2019-20	Harlan Fiske Stone	2L

Pro Bono Work

Type	Hours
Mandatory	40.0

Name: **John J Martin**
Birthdate (MM/DD): **12/21**
Print Date: **05/20/2021**
Student ID: **N15737970**
Institution ID: **002785**
Page: **1 of 2**

New York University
Beginning of Undergraduate Record

Degrees Awarded

Bachelor of Arts 05/18/2016
College of Arts and Science
Honors: magna cum laude
Cum GPA: 3.816
Major: International Relations with honors
Minor: Economics

Test Credits

Test Credits Applied Toward Fall 2012

Test	Component	Units
ADV_PL	English Literature & Comp.	4.0
ADV_PL	European History	4.0
ADV_PL	Economics - Macroeconomics	0.0
ADV_PL	Economics - Microeconomics	0.0
ADV_PL	Psychology	4.0
ADV_PL	Statistics	4.0
ADV_PL	US History	4.0
	Test Totals:	20.0

Fall 2012

College of Arts and Science
Bachelor of Arts
Major: Undecided

Freshman Cohort Meeting	COHRT-UA 10-040	0.0	P
Elem French Level II	FREN-UA 2-006	4.0	A-
Natural Science I: Quarks to Cosmos	MAP-UA 209-001	4.0	A
Cultures & Contexts: Middle Eastern Societies	MAP-UA 511-001	4.0	A-
International Politics	POL-UA 700-001	4.0	A

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	61.600	3.850
Cumulative	16.0	36.0	16.0	61.600	3.850

Spring 2013

College of Arts and Science
Bachelor of Arts
Major: Undecided

Economics Principles I (P)	ECON-UA 1-001	4.0	A-
Writing The Essay:	EXPOS-UA 1-018	4.0	A-
Intens Intermed French	FREN-UA 20-001	6.0	A
Thinking Historically? Revisionism in Ireland, Britain, Germany, and Israel	FRSEM-UA 482-001	4.0	A

	AHRS	EHRS	QHRS	QPTS	GPA
Current	18.0	18.0	18.0	69.600	3.867
Cumulative	34.0	54.0	34.0	131.200	3.859

Term Honor: Dean`s List for Academic Year

Fall 2013

College of Arts and Science
Bachelor of Arts
Major: Politics

Introduction to Microeconomics	ECON-UA 2-020	4.0	A
Natural Science II: Human Genetics	MAP-UA 303-001	4.0	A
Elementary Arabic I	MEIS-UA 101-003	4.0	A
International Law	POL-UA 740-001	4.0	B+
Sophomore Scholars Seminar	SCHOL-UA 20-004	0.0	P
Leadership/Ps/Res Colleg	UPADM-GP 1-002	0.0	P

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	61.200	3.825
Cumulative	50.0	70.0	50.0	192.400	3.848

Spring 2014

College of Arts and Science
Bachelor of Arts
Major: Politics
NYU Abu Dhabi

Elementary Arabic 2	ARABL-AD 102-002	4.0	A
Economic History of the Middle East	ECON-AD 214X-001	4.0	A-
Public Policy Challenges in the Middle East	POLSC-AD 159X-001	4.0	A
International Political Economy	POLSC-AD 173-001	4.0	A
Sophomore Scholars Seminar	SCHOL-UA 20-004	0.0	P

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	62.800	3.925
Cumulative	66.0	86.0	66.0	255.200	3.867

Term Honor: Dean`s List for Academic Year

Fall 2014

College of Arts and Science
Bachelor of Arts
Major: Politics
Minor: Economics

Texts & Ideas: Antiquity & The 19th Century	CORE-UA 404-001	4.0	A-
Conversation and Composition	FREN-UA 30-003	4.0	A
Mathematics for Economics I	MATH-UA 211-013	4.0	P
Intermediate Arabic I	MEIS-UA 103-001	4.0	B+
Junior Scholars Seminar	SCHOL-UA 30-001	0.0	P
Leadership/Ps/Res Colleg	UPADM-GP 1-001	0.0	P

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	12.0	44.000	3.667
Cumulative	82.0	102.0	78.0	299.200	3.836

Spring 2015

College of Arts and Science
Bachelor of Arts
Major: International Relations
Minor: Economics

Statistics (P)	ECON-UA 18-001	4.0	A-
Spoken Contemp French I	FREN-UA 101-002	4.0	A
Intermediate Arabic II	MEIS-UA 104-003	4.0	A
U.S. Foreign Policy	POL-UA 710-001	4.0	B+
Junior Scholars Seminar	SCHOL-UA 30-001	0.0	P
Leadership and Public Service: Residential College Goddard II	UPADM-GP 2-001	0.0	P

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	60.000	3.750
Cumulative	98.0	118.0	94.0	359.200	3.821

Term Honor: Dean`s List for Academic Year

Fall 2015

College of Arts and Science

Name: **John J Martin**
Birthdate (MM/DD): **12/21**
Print Date: **05/20/2021**
Student ID: **N15737970**
Institution ID: **002785**
Page: **2 of 2**

Bachelor of Arts
Major: International Relations
Minor: Economics

International Economics (P)	ECON-UA 238-001	4.0	A-
Intro to Econometrics	ECON-UA 266-004	4.0	A-
Ir Senior Seminar	INTRL-UA 990-002	4.0	B
Topics: Democracy, Dictatorship and Globlization	POL-UA 994-001	4.0	A
Seniors Scholars Seminar	SCHOL-UA 40-001	0.0	P

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	57.600	3.600
Cumulative	114.0	134.0	110.0	416.800	3.789

January 2016

College of Arts and Science
Bachelor of Arts
Major: International Relations
Minor: Economics
AD in Washington DC

Islamic Extremism	POLSC-AD 186JX -001	4.0	A

	AHRS	EHRS	QHRS	QPTS	GPA
Current	4.0	4.0	4.0	16.000	4.000
Cumulative	118.0	138.0	114.0	432.800	3.796

Spring 2016

College of Arts and Science
Bachelor of Arts
Major: International Relations
Minor: Economics

Expressive Culture: Film	CORE-UA 750-001	4.0	A
Ethics and Economics	ECON-UA 207-001	4.0	A
Ir Senior Honors	INTRL-UA 991-002	4.0	A
Seniors Scholars Seminar	SCHOL-UA 40-001	0.0	P

	AHRS	EHRS	QHRS	QPTS	GPA
Current	12.0	12.0	12.0	48.000	4.000
Cumulative	130.0	150.0	126.0	480.800	3.816

Term Honor: Dean`s List for Academic Year

End of Undergraduate Record

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

March 09, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: John Martin

Dear Judge Liman:

I am writing on behalf of John Martin of the Columbia Law School Class of 2021, who is applying to you for a clerkship. John has a strong Law School record. He is very smart, focused, hard-working, a thorough researcher, and a clear and careful writer. He will make an excellent law clerk.

I know John primarily from his work for me as a teaching assistant for my course on the Law of the Political Process in the Fall 2020 term, and from supervising his independent re-search project on the evolving law of campaign contribution restrictions. As a TA, John was consistently prepared, well-organized and professional. Being a TA during that COVID-19 semester was a particular challenge, as the course was being taught "hybrid." I was in the classroom, masked, with about eighteen students, and the other forty-four were simultaneously on Zoom. John's role was essential in managing the combination of in-class and Zoom technology, fielding student questions, and running breakouts and polls. He also conducted Zoom office hours for students. He did this all professionally, patiently, and seamlessly, and his work was essential to the course's success.

John is intellectually curious, and has excellent research, writing, and analytical skills. His short piece in the Virginia Online Law Review on Mail-in Ballots and the Elections Clause came out of an original idea of his and some probing questions he asked me after a session of the Political Process class in which he was a teaching assistant. His supervised research paper on campaign contribution limits pulled together history, a close examination of legal doctrine, and careful study of current campaign finance practices. His writing was particularly nuanced in parsing standards of review and the elements of a multi-part test articulated in a Supreme Court case. He is a very careful reader of cases and a point he raised in the paper got me to see a recent Supreme Court decision in an entirely new light. Although plainly interested in the political and law reform context of election law and especially campaign finance law, John consistently approaches these issues as a lawyer's lawyer – mastering the cases and doctrine, teasing out the implications, and focusing and on the unresolved and unanswered questions.

John had an excellent record at Columbia. He was honored as a Harlan Fiske Stone Scholar in both his second and third years of Law School, which surely puts him in the top quarter of his class. He also received a certificate of achievement from the Parker School, which testifies to his interest in international law. In addition to his strong performance in the classroom, John was an Articles Editor of the Columbia Law Review, which reflects his fellow editors' recognition of his organizational skills and dedication. He was also a teaching assis-tant or research assistant to three of my colleagues, again demonstrating his research, writing, and analytical strengths across a wide range of subjects. John has also had significant practice experience as a legal intern at the Campaign Legal Center, and, starting this year, at the Brennan Center for Justice.

John has a sharp, probing mind, a strong work ethic, and excellent research and writing skills. He has a low-key, modest personality, with a good sense of humor. He is very easy to work with, and eager to be helpful. Based on his academic record, his analytical ability, and his personal qualities, I am sure he will make an excellent law clerk. Please call me at 212-854-2638 if I can be of any further assistance to you in assessing John Martin's application.
Sincerely,

Richard Briffault
Joseph P. Chamberlain Professor of Legislation

Richard Briffault - richard.briffault@law.columbia.edu - 212-854-2638

March 09, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am delighted to recommend my former student John Martin, a member of the Columbia Law School JD class of 2021, for a clerkship in your chambers. He is highly qualified for any top clerkship in the country and I support him enthusiastically.

In John's three years at Columbia, I came to know him in multiple capacities; and in each context, he impressed me with all the qualities for success in any legal position, including a clerkship. Soon after he arrived at Columbia Law School in the fall of 2018, I was asked to become his faculty sponsor under the Hamilton Fellowship program, which offers a small number of incoming students a full-tuition merit-based scholarship and places them with a faculty member for ongoing mentorship. Because of John's interests in my own field of international law, I eagerly undertook to mentor him as a Hamilton Fellow and was very pleased that his curricular choices related to international law gave me the opportunity to work with him in the classroom and in the preparation of a supervised research paper.

In the spring semester of his first year of law school (spring 2019), John took my International Law course as an approved 1-L elective. Over most of my teaching career at Columbia, this course has been offered only to upper-division law students and advanced graduate students; only recently did the administration allow 1-Ls to enroll in International Law in their second semester. The course that John took was a medium-sized class of about 40 students, in which it was possible to get to know all the students personally and appreciate their different strengths. There were three bases of evaluation: (1) blind-graded examination, accounting for approximately half the grade; (2) class participation throughout the semester, and (3) a short research exercise on a topic involving international treaties. John excelled on all measures of evaluation and received the grade of "A" for the course – one of only a few such high grades awarded that semester. This performance is all the more impressive given that most students in the class were further along in their legal studies (including some with previous study of and experience in international law).

After completion of his 1-L year, John was accepted onto the Columbia Law Review; and in that capacity, he asked me to supervise his preparation of a draft note and also to work with him as supervisor of his major writing project. In light of his outstanding performance in my International Law class and the fact that his intended topic would be in the area of foreign sovereign immunity, I was happy to undertake these supervisory responsibilities. In fall 2019, he framed and refined the issue for the note, focusing on possible avenues for suing foreign states in U.S. courts for attacks on the cybersecurity of foreign dissidents located in the United States. The topic entails close examination of the Foreign Sovereign Immunities Act as recently amended by the Justice Against Sponsors of Terrorism Act, with a view to determining whether the ordinary presumption of foreign sovereign immunity could be overcome in the case of cyber intrusions jeopardizing the privacy, security, and perhaps even the life of a target of such an attack. The result is an excellent paper, which was published by the Columbia Law Review in January of 2021, with the title "Hacks Dangerous to Human Life." Based on its high quality, I awarded it the grade of "A" for two points of academic credit in fall 2019 and also certified it in fulfillment of the JD major writing requirement.

The note deals with the availability of legal remedies against governments that interfere with freedom of expression of dissidents by hacking their communications. It shows John's capabilities for researching and analyzing cutting-edge legal issues and presenting original insights in a well-written and persuasive way. Significantly, the note has already been cited in at least one petition for certiorari to the U.S. Supreme Court, in a case seeking to pierce the sovereign immunity of a foreign state allegedly involved in a cyberattack on U.S. citizens.

John earned academic honors at the Harlan Fiske Stone Scholar level twice and received recognition at graduation from Columbia's Parker School for his achievements in international and comparative law. He continued to deepen his knowledge of the protection of free expression in international and U.S. law through his course of study in his second and third years of law school. He likewise remained engaged in research and writing through his work as an articles editor of the Law Review and other co-curricular and extracurricular activities, with continued success in preparing and placing legal articles for publication.

John is well-equipped for a clerkship by virtue of his experience as an extern with the U.S. Court of Appeals for the Second Circuit during his second year of law school and his fellowship after graduation with the Brennan Center for Justice in its Election Reform Program. He is deeply committed to a public interest career.

He is superbly qualified for a clerkship and I commend him to you with great enthusiasm.

Sincerely yours,

Lori Fisler Damrosch

Lori Damrosch - damrosch@law.columbia.edu - 212-854-3740

Lori Damrosch - damrosch@law.columbia.edu - 212-854-3740

March 09, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

Recommendation of John J. Martin for Clerkship

I'm delighted to give my highest possible recommendation of John Martin for your clerkship. I have no doubt he'll make a great clerk. He has all the intellectual and personal qualities that count for the job. I encourage you to snap him up.

Mr. Martin served as the Articles Editor of the *Columbia Law Review* and was awarded Harlan Fiske Stone honors on the basis of grades alone.

I had the pleasure of seeing his intellectual power in action: as a student in my Constitutional Law course in Spring 2019 and Labor Law course in Spring 2020, as my research assistant in Spring 2020, and again as my research assistant on a different project in Fall 2020-Spring 2021.

He excelled in all four contexts. In my Constitutional Law and Labor Law courses, Mr. Mar-tin's interjections were always constructive and smart, moving the discussion forward, raising intriguing original points, and building graciously on what other students and I had said. His exams were systematic, well crafted, and analytically sharp.

Mr. Martin came to my office hours frequently (in person and, later, via zoom) and I always looked forward to our long conversations. He's intellectually curious, concerned about the ana-lytics of the cases and, equally, the implications of the law for ordinary people's lives, for the rule of law, and for justice.

It was as my research assistant that I got to know Mr. Martin particularly well. In spring 2020, when the plague descended, he volunteered to assist me on a project investigating the free speech rights of government workers whose employers punished them for protesting about on-the-job exposure to the virus, and about the exposure of customers, patients, and the communi-ty. The law in this area is about as contorted as it gets. His research was terrific—thoroughly researched, lucidly explained, and reliable. I emphasize "reliable," because, frankly, I find that as good as my Columbia research assistants are, I typically have to follow up with pretty time-consuming re-plowing of the field, to check for comprehensiveness and accuracy. With Mr. Martin, I became confident that I did not need to re-till in that way, even in such a difficult area. That was wonderful. For that reason, I was happy when he volunteered to assist with another project in fall 2020 and again in spring 2021. We were designing legislation and institutions to incorporate channels for worker voice in a major sector of the economy in its reconstruction during and after the pandemic—an even more complex clump of research. Again, his work was energetic, agile, smart, and reliable. (I wish I could give more details about his role, but for rea-sons of attorney-client privilege, I can't.)

Working with Mr. Martin was also a pleasure in personal terms. He's a mild-mannered, wry, and cheerful collaborator. He takes supervision well, he's responsive, and he's proactive in sug-gesting new directions in substance and in source material. He's self-motivated, and knows when to come for supervision and direction.

It was a pleasure to have several lengthy one-on-one zoom conversations with him about fami-ly, politics, and life. He stayed cheerful during the pandemic, even though his parents are in a tough stretch. John's working-class background is at the core of his identity and his concern for the impact of the law on the people it affects.

So, again, I give Mr. Martin my highest possible recommendation. As I said at the top, he has all the qualities that count for being a top-notch clerk and a great asset to your chambers. You can't go wrong with him.

Sincerely,

Professor Mark Barenberg
Isador and Seville Sulzbacher Professor of Law
Columbia Law School
New York City

JOHN MARTIN
550 2nd St., Apt. 1F • Hoboken, NJ 07030 • (610) 297-2392 • john.martin@columbia.edu

Writing Sample — Memo

This writing sample is a memorandum I wrote in my current position as a legal fellow at the Brennan Center for Justice. In recent years, "scam PACs"—bogus groups masquerading as legitimate political action committees—have become a notable problem during federal elections, causing many state regulators to seek to crack down on such scam PACs through the application of state law (e.g., antifraud statutes). Accordingly, some state regulators communicated with the Brennan Center for guidance, raising a few questions about the potential repercussions of pursuing civil or criminal enforcement against scam PACs. This memorandum answers some of those questions, namely the extent to which the First Amendment protects the actions of scam PACs and whether the Federal Election Campaign Act (FECA) preempts the enforcement of state law against federal scam PACs. No one edited this memorandum other than myself.

To: [name removed upon request]
From: John Martin
Re: Federal Scam PACs, the First Amendment & Federal Preemption
Date: September 8, 2021

Questions Presented

1. What level of First Amendment protection is afforded to false and/or misleading speech?
    a. Is false political speech more or less protected than false commercial speech?
    b. What level of falsehood is required for speech to lose its protection?

2. To what extent are state regulators who are cracking down on federal scam PACs likely able to argue that their efforts to enforce state law are not preempted by FECA?

Short Answers

1. The level of First Amendment protection afforded to false/misleading speech depends greatly on the context of a given case. While the Supreme Court has maintained the importance of protecting some false speech, such as false speech that pertains to public issues, the Court has also held as constitutional prohibitions on other types of false speech, including fraud, perjury, and false commercial speech. As for a modern approach to content-based restrictions on false speech, Justice Kennedy's and Justice Breyer's respective plurality opinion and concurrence in *United States v. Alvarez* provide some guidance, namely that such restrictions must be narrowly tailored and target a specific harm to survive First Amendment scrutiny.

   False political speech is more protected than false commercial speech. Federal courts have struck down many laws prohibiting false political speech, indicating that only the most narrowly tailored of such laws could survive. Meanwhile, the Court's *Central Hudson* test explicitly states that false commercial speech has virtually zero protection under the First Amendment. For false commercial speech to be "false" enough to lose its First Amendment protection, however, it cannot be mere puffery or opinion, nor can it be subject to multiple interpretations by the consumer. Rather, truly "false" commercial speech must be unambiguous and present a real danger of misleading consumers.

2. The question of whether FECA preempts the enforcement of state law against federal scam PACs has gone unanswered by the Supreme Court. Nevertheless, federal circuit and district court opinions on FECA and preemption offer some guidance on the extent to which FECA may preempt such enforcement of state law. Express preemption likely provides the greatest hurdle because FECA has an express preemption clause. Nevertheless, courts have read FECA's preemption clause fairly narrowly, permitting states to subject federal political committees to a variety of state laws that have nothing to do specifically with federal elections. Meanwhile, neither field nor obstacle preemption seem too applicable, provided that states are enforcing laws of general applicability against federal scam PACs.

Discussion

First Amendment Protection of False/Misleading Speech

Whether false speech is protected under the First Amendment is a complicated question that depends on a variety of factors. In general, though, false political speech tends to receive strong First Amendment protection whereas false commercial speech receives virtually none. For commercial speech to be deemed false, however, such speech cannot be mere opinion or puffery; instead, to lose its First Amendment protection, commercial speech must be unambiguously false and present an actual danger of misleading consumers.

Level of First Amendment Protection

The level of First Amendment protection provided to false speech is highly context specific. As Professor Erwin Chemerinsky explains, "There is no consistent answer as to whether false speech is protected by the First Amendment."[1] Rather, the Supreme Court has approached its analyses of cases involving the regulation of false speech by balancing competing interests, thus arriving at different conclusions depending on the facts of the particular case.[2] Accordingly, while the Court has said that "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements,"[3] the Court still affords First Amendment protection to at least some false speech.

The Court has especially maintained the importance of protecting false speech in cases in which the speech in question pertained to public issues. In *New York Times Co. v. Sullivan*,[4] for example, the Court struck down a libel suit filed by an elected Montgomery official against the New York Times for publishing an advertisement critical of the manner in which Montgomery police had treated civil rights demonstrators, despite the advertisement containing indisputably false statements.[5] In doing so, the Court invoked the First Amendment, emphasizing "the principle that debate on public issues should be uninhibited, robust, and wide-open."[6] More importantly, the Court explicitly stated that "erroneous statement[s] [are] inevitable in free debate," and that "[they] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need

[1] Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 5 (2018) ("[T]he Court never will be able to say that all false speech is outside of First Amendment protection or that all false speech is constitutionally safeguarded.").
[2] *See id.*
[3] Brown v. Hartlage, 456 U.S. 45, 60 (1982).
[4] 376 U.S. 254 (1964).
[5] *See id.* at 292. The advertisement's false statements included the following: (1) It said that Martin Luther King Jr. had been arrested seven times, when in reality he had only been arrested four times; (2) It said that nine students had been expelled for the demonstration, while their suspension had been for a different protest; and (3) It erroneously said that a dining hall had been padlocked. *Id.* at 258–59.
[6] *Id.* at 270.

to survive.'"[7] Consequently, *New York Times v. Sullivan* ultimately established that at least some false speech is protected under the First Amendment.[8]

More recently, the Court has suggested that the constitutionality of content-based restrictions on false speech turns on the nature of the harm and whether alternative remedial measures exist. In *United States v. Alvarez*,[9] for example, the Court struck down a provision of the Stolen Valor Act that criminalized lying about having a military medal.[10] The Court, nevertheless, was split over which level of scrutiny to apply. Writing for the plurality, Justice Kennedy applied "exacting scrutiny," requiring the government to demonstrate that the restriction on false speech achieves a compelling interest in the least restrictive means possible.[11] Under this standard, Justice Kennedy found the provision to be overinclusive because, "by its plain terms[,] [it] applies to a false statement made at any time, in any place, to any person."[12] Moreover, Justice Kennedy found the restriction unnecessary for the government to achieve its interest in preserving the integrity of the military honors system, for two reasons. First, the government did not provide any evidence that "the public's general perception of military awards is diluted by false claims [such as stolen valor.]"[13] Second, the government did not show "why counterspeech would not suffice to achieve its interest."[14] Thus, the Stolen Valor Act provision did not survive Justice Kennedy's exacting scrutiny approach, nor likely would most content-based restrictions on false speech.

Writing his own concurrence in *Alvarez*, Justice Breyer noted that "[the] Court has frequently said or implied that false factual statements enjoy little First Amendment protection."[15] Justice Breyer, nevertheless, asserted that "these judicial statements cannot be read to mean 'no protection at all'" because "[f]alse factual statements can serve useful human objectives."[16] Accordingly, Justice Breyer advocated for an intermediate standard of review, which he called "proportionality review."[17] Under this standard, the Court would "determine whether the statute works speech-related harm that is out of proportion to its justifications."[18] Applying

[7] *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).
[8] The Court's actual holding is much narrower, namely that public officials bringing defamation cases over a false statement must prove that the defendant said such statement with "actual malice." *Sullivan*, 376 U.S. at 279–80. The case's protection of false speech, however, is one of its greatest legacies. *See* Chemerinsky, *supra* note 1, at 7.
[9] 567 U.S. 709 (2012).
[10] *Id.* at 729–30 (plurality opinion). The struck-down provision stated that "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both." 18 U.S.C. § 704(b) (2012).
[11] *See Alvarez*, 567 U.S. at 715 (plurality opinion).
[12] *Id.* at 722–23.
[13] *Id.* at 726.
[14] *Id.* at 726–27 ("The remedy for speech that is false is speech that is true.").
[15] *Id.* at 732–33 (Breyer, J., concurring in the judgment). Justice Kagan joined Justice Breyer's concurrence.
[16] *Id.* at 733. Examples that Justice Breyer provided include protecting privacy, preventing embarrassment, and preserving a child's innocence. *See id.*
[17] *Id.* at 730–31.
[18] *Id.* at 730. This would include accounting for factors such as (1) "the seriousness of the speech-related harm the provision will likely cause"; (2) "the nature and importance of the provision's countervailing objectives"; (3) "the extent to which the provision will tend to achieve those objectives"; and (4) "whether there are other, less restrictive ways of doing so." *Id.*